

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 53

LAWRENCE C. KINGSLAND, COMMISSIONER OF
PATENTS, PETITIONER

vs.

VERNON M. DORSEY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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In the United States Court of Appeals, District of Columbia

No. 9572

VERNON M. DORSEY, APPELLANT

v.

CASPER W. OOMS, APPELLEE

Appeal from the District Court of the United States for the
District of Columbia

Joint appendix

Filed Jun 27, 1945

In the District Court of the United States for the
District of Columbia

IN THE MATTER OF THE ORDER OF THE COMMISSIONER OF PATENTS
DISBARRING VERNON M. DORSEY FROM PRACTICE IN THE PATENT
OFFICE

*Petition for Review of Commissioner's Action Excluding Vernon
M. Dorsey, the Petitioner from Practice Before the Patent
Office*

*To the Honorables, the Chief Justice and the Associate Justices
of the District Court of the United States for the District of
Columbia:*

Vernon M. Dorsey, being aggrieved by the action of Conway P. Coe, then the Commissioner of Patents in entering his Order No. 3938 dated May 18, 1945 disbaring Petitioner from further practice before the United States Patent Office for alleged gross misconduct hereby petitions this Court to review and reverse the action of the Commissioner contained in said order of disbarment, and to issue its writ of mandamus ordering the said Coe to annul the said order.

JURISDICTION

This review is sought under (a) the authority of Section 487, R. S. as amended (35 U. S. C. A. § 11), conferring jurisdiction therefor upon this Court, and (b) the general power of this Court to correct by its writ of mandamus an exercise of power in an unlawful and arbitrary manner, by an inferior court or a quasi-judicial officer.

PROCEEDINGS IN THE PATENT OFFICE

On October 11, 1944 the Commissioner of Patents issued an order directed to Petitioner to show cause why he should not be

3 "suspended or excluded from further practice before the United States Patent Office for gross misconduct." A copy of said order is attached as Exhibit A of this petition. Within the permitted time Petitioner filed his verified response, denying the specified charges.

The matter came on for hearing before the Committee on Enrollment and Disbarment of the Patent Office on November 21, 1944, the taking of testimony extending through November 25, 1944. The hearing on the order against Petitioner was consolidated with hearings on orders to show cause against three other respondents, viz: R. D. Brown, R. F. Hatch, and Henry Carter.

Later, the matters were briefed and argued before the Commissioner and his Committee.

On April 26, 1945 the Committee reported to the Commissioner, five of its members recommending disbarment of your Petitioner and two of them recommending against disbarment but recommending suspension from practice for a limited period of time.

On May 18, 1945 the Commissioner filed an opinion approving the report of the Committee and entered an order disbarring Petitioner from further practice as by Exhibit B attached. Concurrently he entered like orders against the three respondents who had been heard with Petitioner. One of said respondents has since died. Petitioner is informed that petitions for review by this Court are to be filed by the others.

SUMMARY STATEMENT

1. Petitioner is 76 years of age and is a resident of Maryland and has since 1890 had an office in the District of Columbia. Since that date (1890) he has practiced before the Patent Office and before the several Courts of the United States including this Court and its predecessor. In the course of his practice he has built up a considerable practice having been employed in many important patent matters and has always enjoyed a high reputation for honesty. Throughout this period of 54 years, Petitioner has never been charged or accused of any professional misconduct, except with respect to the proceedings

4 now brought here for review which proceeding concerns matters nearly 20 years ago.

2. Petitioner avers that he is innocent of any wrong doing in the premises, that no evidence of wrong doing by him was adduced in the Patent Office proceedings and that he was denied due process of law in the proceedings in the Patent Office in that incom-

petent testimony was used against him and he was convicted of alleged offenses not included in the charges served on him.

3. The order to show cause recited the decision of the Supreme Court in *Hazel-Atlas Glass Company vs. Hartford-Empire Company*, 322 U. S. 238 (to which this Petitioner was not a party) wherein that Court, upon an incomplete record insofar as concerns your Petitioner, said fraud had been practiced on the Patent Office by the preparation and presentation to the Patent Office (in 1926) of the Clarke article entitled—"Introduction of Automatic Glass Making Machinery; How Received by Organized Labor by William P. Clarke, President of the American Flint Glass Workers Union"—during the prosecution of the application for Peiler Patent 1,655,391, owned by the Hartford-Empire Company, (hereinafter called Hartford). Your Petitioner avers that the said article was true and correct.

4. The offense charged in the order to show cause was that your Petitioner filed the said article in the Patent Office alleging that Clarke was the author thereof. Your Petitioner believes that implied in said charge is the further charge that your Petitioner knew that Clarke was not the author thereof.

5. Petitioner's whole connection with the matter specified in the charge was as follows:

A. Upon his return to the United States between March 30 and April 3, 1926 from Europe where he had spent two months, Petitioner found on his desk the manuscript of an article sent him by Roswell F. Hatch, another of the respondents named in the Patent Office proceeding. Petitioner hastily read the said manuscript and returned it to Hatch with the correction of two words, both of such corrections being linguistic.

B. That Petitioner was, at the time referred to, an associate attorney in the matter of the application of Peiler, which application subsequently resulted in the issuance of the Peiler patent No. 1,655,391, before referred to; that Petitioner at a somewhat later date being desirous of ascertaining all facts relevant to the patentability of the invention of the said application and believing that the article to be published might have a bearing thereon requested Hatch to send him a copy of such article; that Hatch thereupon under date of May 20, 1926 sent Petitioner another copy of the manuscript previously sent Petitioner and stated that he expected one William P. Clarke, a Glass Union Official, would take the manuscript, revise it or rewrite it in accordance with his own views and cause the same to be published as his, Clarke's article.

C. That the said Clarke caused an article to be published in the *Glass Budget* of July 17, 1926 under the caption "By William P. Clarke"; that Petitioner subsequent to such publication read the

article and from his intimate knowledge of the art to which it related believed the article to be true and that it would help in the prosecution of the said Peiler application.

D. That Petitioner, on October 12, 1926 filed in the United States Patent Office a printed copy of the said Glass Budget article, referring to it as published in the Glass Budget "By William P. Clarke".

E. That at the time Petitioner filed the said article in the Patent Office he believed that Clarke was in fact the author thereof, his knowledge concerning the preparation and printing of the said article being wholly as stated in the foregoing.

6. The Committee made no finding that Petitioner at the time he filed the Clarke article in the Patent Office knew that Clarke was not the author thereof, but instead based their finding of his guilt on three matters not included in the charges and as to which they received evidence. Such evidence bore on:

(a) An alleged arrangement made between the other respondents while your Petitioner was abroad to have the said article written by Hatch and signed by Clarke, or some other person having knowledge of the facts stated in the article. The Committee had no proof before them that your Petitioner was cognizant of the above (which he was not), if true, and did not at the hearing indicate that evidence thereon would be considered against your Petitioner but in the absence of such proof and notice held your Petitioner guilty of misconduct in connection therewith.

(b) An alleged payment of money by other respondents to Clarke in 1932, six years after the filing of the article in the Patent Office. The Committee considered this payment as "throwing light on the events of 1926". Petitioner had no knowledge of this payment and there was no proof adduced that he did; yet the Committee considered the fact of such payment as tending to prove misconduct on the part of Petitioner. Your Petitioner was not notified at the time that evidence on this point would be considered against him.

(c) The reasons advanced in a brief filed by Petitioner in the Patent Office in 1927 and based on the exact language of the Clarke article. The Committee found in 1945 that such argument misconstrued the teaching of the Clarke article and for that reason held your Petitioner guilty of misconduct, although the argument was one not only true but properly based on the article and had been for seventeen years prior to the filing of the charges herein, spread on the records of the United States Patent Office and had been in 1932 spread on the records of the United States Circuit Court of the 3d Circuit without being criticized, the facts as to the

existence of said argument on file in the Patent Office being open and notorious.

7. The Committee in their report rely, in finding your Petitioner guilty, on conversations and correspondence between other respondents, although no charge was made in the rule that your Petitioner had conspired, of which conversations and correspondence your Petitioner had no knowledge, some of them taking place while your Petitioner was abroad and some in 1932, years after the matters charged in the Rule to Show Cause.

8. Petitioner charges that the finding of misconduct against him was based not on the evidence adduced before the Committee but on language used in the opinion of the Supreme Court in the Hazel-Atlas v. Hartford case because, as stated in the Committee's report, Petitioner took no action to correct such language, if erroneous although the Commissioner knew that Petitioner was not a party to such litigation and that there was no procedure open to or by which Petitioner could move to correct such language.

9. Although requested in writing so to do, the Commissioner has refused to stay his order of disbarment against Petitioner pending the consideration and disposition of this petition, to Petitioner's irreparable injury.

10. The punishment imposed upon Petitioner, namely, perpetual disbarment to practice before the Patent Office, is cruel and unjustified and far in excess of any punishment justified by any real or fancied ethical or professional offense which can be supported by the facts of record.

11. Your Petitioner represents that he will suffer irreparable damage in his reputation and in his ability to earn his livelihood unless said order of disbarment is immediately suspended and eventually canceled and annulled in that it will deprive him not only of ability to take on new cases before the Patent Office, but will prevent him from continuing to act as attorney in the numerous cases in which he is now attorney. Further it will drive his clients to seek new representation, thereby depriving Petitioner of the benefit of the good reputation he has earned by fifty years of conscientious practice.

8. ASSIGNMENTS OF ERROR

Assignments of error are filed herewith and constitute the Appendix of this petition.

PRAYERS FOR RELIEF

Wherefore, your Petitioner prays that this Honorable Court—

(1) Order, by its subpoena ad respondendum the successor in

office of the said Conway P. Coe as Commissioner of Patents to answer this petition and to abide any order of the Court thereon.

(2) Review the action of the Commissioner of Patents in disbaring and excluding Petitioner from practice before the Patent Office, including in its review the orders to show cause, the evidence taken by and other proceedings before the Committee, the report of the Committee, the Commissioner's letter and his order.

(3) Order the Commissioner of Patents to certify to this Court the orders, letters, reports and record and briefs and transcript of argument above mentioned.

(4) Immediately order the Commissioner of Patents to stay the said order No. 3938 of May 18, 1945 pending the review by this Court of these proceedings.

(5) Receive briefs and hear oral arguments on Petitioner's behalf.

(6) Reverse the action of the Commissioner of Patents and order him by mandamus or otherwise to restore to Petitioner his full rights and privileges to practice before the Patent Office.

(7) To grant your Petitioner such other and further relief as to the Court may seem proper.

And your Petitioner will ever pray.

VERNON M. DORSEY, *pro se*,
Nat. Press Bldg., Washington 4, D. C.

9 DISTRICT OF COLUMBIA, ss:

Vernon M. Dorsey, being duly sworn, deposes and says that the several facts stated in the foregoing Petition for Review are true and correct.

VERNON M. DORSEY.

Sworn to and subscribed before me, a Notary Public, in and for the District of Columbia, on this 26th day of June 1945.

[SEAL]

EUNICE CAPLAN, *Notary Public*.

Filed Jun 27, 1945

APPENDIX

The Commissioner of Patents erred—

1. In entering his order No. 3938 dated May 18, 1945 because the same is contrary to law and without evidence to support.

2. In considering matters not charged against petitioner in the Order to Show Cause on which the petitioner was tried, and founding his order of disbarment thereon.

3. In basing his determinations of May 18, 1945 to any extent upon the statements in the opinion of the Supreme Court in the

case of Hazel-Atlas Company v. Hartford-Empire Company, 322 U. S. 238, and relying on such statements as a substitute for evidence, or as in anywise binding on this Petitioner, who was not a party to said suit.

4. In considering, in determining Petitioner's guilt of the specific charges filed against him, any matters other than the filing of the Clarke article in the Patent Office with knowledge that on the part of the Petitioner Clarke was not the author thereof.

5. In considering, in determining Petitioner's guilt, incompetent proof in the form of letters and conversations between others than Petitioner, of which Petitioner had no knowledge.

10 6. In considering against Petitioner any exhibits introduced at the hearing other than Departmental Exhibits D, E, F, G, and H, and Dorsey Exhibits 72, 72A, 72B, and 72C.

7. In issuing the order of disbarment against Petitioner in the absence of any proof in the record that Petitioner knew when he filed the Clarke article in the Patent Office that it was by one other than Clarke.

8. In issuing the order of disbarment against Petitioner in the absence of any holding that Petitioner knew when he filed the Clarke article in the Patent Office that it was by one other than Clarke.

9. In considering, in connection with Petitioner's guilt, any facts connected with Hatch's contact with Clarke, other than those stated in the Hatch letter to Petitioner (Exhibit D-72-c).

10. In holding that Petitioner took any part in "procuring" the signature of Clarke to the article.

11. In issuing the order complained of in the absence of any holding of Petitioner's guilt in respect to the charges specified in the Order to Show Cause and only on findings of guilt in connection with matters not specified in such order.

12. In issuing the order complained of on the ground that the Petitioner concealed from the Patent Office that the writing and publication of the Clarke article was "procured" by Hatch or Hartford such matter not being recited in the charges against Petitioner.

13. In issuing the order complained of on the ground that Petitioner was guilty of misconduct in his representation and use of the Clarke article, the same not being recited in the charges against him.

14. In holding (p. 17) that Petitioner was a party to a plan to conceal the instigation and preparation of the Clarke article, or did anything to that end.

15. In holding that Petitioner misrepresented and misused the Clarke article.

11 16. In considering, in determining Petitioner's guilt of the specific charges filed against him, any argument or contention made by the Petitioner as to the true purport and teaching of the Clarke article, the same not being included in the specification.

17. In considering, at this time, in determining Petitioner's guilt, the soundness of arguments made 18 years previously and spread on the records of the Patent Office, in that the falsity if any of such arguments was as apparent then as it may be now.

18. In holding (p. 16) any improper argument was made by Petitioner, based on the contents of the Clarke article.

19. In holding that gross misconduct can consist in an unsound argument based on an exhibit, there being no misrepresentation or misquotation of the exhibit.

20. In considering, against Petitioner, any event relating to the payment of money to Clarke, the same not being embodied in the specification.

21. In considering, in determining Petitioner's guilt of the specific charges filed against him, any act, or acts; viz, the payment of money to Clarke, done by others without his knowledge, privy, consent or advice of Petitioner, years after the filing of the said Clarke article in the Patent Office on which the charge is based.

22. In considering, in connection with the case of Petitioner, the payment of money to Clarke and particularly in holding, as against Petitioner, that "these subsequent events cast their light backwardly," Petitioner having no part in such payment, or knowledge of it.

23. In considering, in connection with the case of Petitioner, the dealings of 1932 with Clarke, after holding that Petitioner took no part in such dealings (pp. 25 to 34).

24. In considering, in connection with the case against your Petitioner, any question of conspiracy with others, the same not having been included in the charges nor brought up at the hearing.

12 25. In holding that Petitioner conspired with other respondents, or with Clarke, to work a fraud on the Patent Office, there being no evidence to support the same.

26. In perpetually disbarring Petitioner from practice before the Patent Office since said punishment is cruel, excessive and unjustified.

27. In issuing the order complained of, nineteen years after the acts charged in the absence of clear and definite proof the misconduct alleged.

Filed Jun 27, 1945

EXHIBIT A

Address only The Commissioner of Patents, Washington, D. C.

DEPARTMENT OF COMMERCE

UNITED STATES PATENT OFFICE

WASHINGTON

OCTOBER 11, 1944.

Mr. VERNON M. DORSEY,

National Press Building, Washington, D. C.

SIR: Whereas it was found by the Supreme Court of the United States in its decision in the case of Hazel-Atlas Glass Co. v. Hartford-Empire Co., 64 S. Ct. 997, that fraud was practiced on the United States Patent Office during the prosecution of the patent application of Karl E. Peiler, No. 294,792, which matured into patent No. 1,655,391 on January 3, 1928, which fraud consisted in the preparation and presentation to the United States Patent Office of an article entitled "Introduction of Automatic Glass Working Machinery; How Received by Organized Labor", naming one William P. Clarke as the author, who in fact was not the author of said article, and

13 Whereas it appears from said decision and the record of the case before the Supreme Court, and the record before the United States Circuit Court of Appeals, Third Circuit, in the case of Hartford-Empire Co. v. Hazel-Atlas Glass Co., 137 F. (2d) 764, and the record before the District Court, Northern District of Ohio, West Div., in the case of United States v. Hartford-Empire Co., 46 F. Supp. 541, and the records of the Patent Office, that you participated in the preparation of said article and/or the presentation thereof to the United States Patent Office during the prosecution of said patent application knowing that said article was not written by said William P. Clarke, and with the purpose of deceiving the Patent Office as to the authorship of said article and influencing the action of the Patent Office on said application; and that you thereby perpetrated or participated in the perpetration of a fraud on the United States Patent Office.

Now, therefore, you are hereby ordered to show cause on or before November 9, 1944 why, in view of the above, you should not be suspended or excluded from further practice before the United States Patent Office for gross misconduct.

You are hereby notified that a hearing on this order to show cause will be accorded to you before the Committee on Enrollment and Disbarment of the United States Patent Office on November 9, 1944 in Room 1935 of the United States Patent Office in the Department of Commerce, 14th and E Streets NW., Washington, D. C., beginning at 10:00 A. M. on said date.

(S) CONWAY P. COE,
Commissioner of Patents.

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Filed Jun 27, 1945

EXHIBIT B

DEPARTMENT OF COMMERCE
UNITED STATES PATENT OFFICE
WASHINGTON

MAY 18, 1945.

ORDER No. 3938

Acting under the provisions of Section 487 of the Revised Statutes (U. S. C., Title 35, Sec. 11), Vernon M. Dorsey, of Washington, D. C., whose registration number is 534, is hereby disbarred from practice before the United States Patent Office for gross misconduct.

CONWAY P. COE, *Commissioner.*

Filed Jun 27, 1945

EXHIBIT C

DEPARTMENT OF COMMERCE
UNITED STATES PATENT OFFICE
WASHINGTON

MAY 18, 1945.

IN THE MATTER OF THE DISBARMENT OF ROBSON D. BROWN, ROSEWELL F. HATCH, VERNON M. DORSEY, HENRY W. CARTER

An order to show cause why he should not be disbarred from practice before the United States Patent Office was issued against each of the above named respondents. Answers were filed and a hearing had before the Committee on Enrollment and Disbarment of the Patent Office, at which time testimony and exhibits were introduced by the respondents. The Committee has made its report to me and in the report a majority of the Committee has recommended that all of the respondents be

disbarred from practice before the Patent Office. A copy of the report is transmitted herewith.

That a fraud was practiced on the Patent Office, as charged in the orders to show cause, was found by the Supreme Court of the United States in the case of Hazel-Atlas Company v. Hartford-Empire Co., 322 U. S. 238, 61 USPQ 241, which was a suit to set aside the judgment of the Court of Appeals for the Third Circuit sustaining the validity of the Peiler patent No. 1,655,391, which was granted on the Peiler application referred to in the orders to show cause.

In its Opinion in that case the Supreme Court said:

Here even if we consider nothing but Hartford's admission, we find a deliberately planned and carefully executed scheme to defraud not only the Patent Office but the Circuit Court of Appeals.

I have given careful consideration to the Committee's report and to the entire record made at the hearing and I am convinced that each of the above named respondents participated in the scheme to defraud the Patent Office, as was found by the Committee, and I approve the recommendation of the majority of the Committee, that each of the respondents be disbarred from further practice before the United States Patent Office. Orders of disbarment have this day been issued.

CONWAY P. COE, *Commissioner.*

Mr. EDGAR J. GOODRICH (for Brown and Hatch),
Investment Building, Washington, D. C.

Mr. ALBERT C. HIRSCH (for Brown and Hatch),
Room 418 Frick Building, Pittsburgh, Pennsylvania.

16 Mr. SIDNEY F. PARHAM (for Brown and Hatch),
c/o Hartford-Empire Company,
P. O. Drawer 1620, Hartford, Connecticut

Mr. VERNON M. DORSEY, *per se,*
National Press Building, Washington, D. C.

Mr. EDMUND P. WOOD (for Carter),
2801 Carew Tower, Cincinnati 2, Ohio

Filed Jul 10, 1945

Answer to Petition for Review

*To the Honorable the Justices of the District
Court of the United States for the
District of Columbia.*

JURISDICTION

The respondent, Leslie Frazer, Acting Commissioner of Patents, admits allegation (a) as to jurisdiction as set forth in the petition; he denies allegation (b) as to jurisdiction.

PROCEEDINGS IN THE PATENT OFFICE

He admits that proceedings took place in the Patent Office as set forth in the petition under the heading "Proceedings in the Patent Office".

SUMMARY STATEMENT

1. He admits for the purposes of this action the allegations contained in the first two sentences of section 1 of the Summary Statement in the petition. As to the statements contained in the third and fourth sentences of this section he is without information sufficient to enable him to form an opinion.

17 2. He denies the averments of section 2 of the Summary Statement.

3. He admits that the Order to Show Cause cited the decision of the Supreme Court in Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U. S. 238 and that the Order was to some extent predicated upon such decision. He denies that the said decision was based upon an incomplete record. He denies that the Clarke article referred to was "true and correct".

4. He admits that one of the offenses charged against the petitioner in the Order to Show Cause was that he filed the Clarke article in the Patent Office alleging that Clarke was the author thereof. He states that the Order to Show Cause expressly alleged that the petitioner knew that Clarke was not the author of this article.

5. He denies the averment of section 5 of the Summary Statement.

6. He denies that the Committee made no finding that the petitioner knew, when he filed the article, that Clarke was not the author thereof. He denies that the finding of the Committee was based solely on the matters alleged in section 6 of the petitioner's Summary Statement. He denies that the Committee had no proof before them that the petitioner was cognizant of the fact Clarke was not the author of the article published in his name. He states that the petitioner was or should have been aware that the evidence as to the payment of money to Clarke for his part in publication of the article might be considered in connection with the disbarment proceeding against the petitioner. He admits that the Committee found that the petitioner's argument presented to the

Patent Office in 1927 misconstrued the teaching of the Clarke article. He denies that this finding is incorrect or that petitioner's argument was properly based on the article.

7. He states that the Order to Show Cause issued against the petitioner alleged that the petitioner had participated in the preparation of the Clarke article and/or presentation thereof to the United States Patent Office, knowing that said article was not written by William P. Clarke. He further states that the Order to Show Cause was based in part upon the decision of the Supreme Court of the United States in the case of Hazel-Atlas Glass Co. v. Hartford-Empire Co., 64 S. C. 99, and that the said decision holds there was "a deliberately planned and carefully executed scheme" to defraud the Patent Office by the preparation and presentation of the Clarke article. He states that under these circumstances it is proper to consider in connection with the petitioner's conduct evidence as to activity by others of those who participated in the preparation and presentation of the article. He denies that the Committee relied on any improper evidence or made any improper ruling in connection with the petitioner.

8. He denies the allegation of section 8 of the petitioner's Summary Statement.

9. He admits that the Commissioner has refused "to stay his order of disbarment against the petitioner pending the consideration and disposition of this petition". He denies that such action has occasioned or will occasion irreparable injury to the petitioner.

10. He denies the allegations of section 10 of the petitioner's Summary Statement.

11. He admits that the petitioner may suffer damage in the event that the order of disbarment remains in effect. He states that this is immaterial since the order of disbarment was properly issued after full consideration of the evidence and the fact that it may work a hardship on the petitioner is not a justification for setting it aside.

ASSIGNMENTS OF ERROR

He denies that any error was committed by either the Commissioner or the Committee on Enrollment and Disbarment in any of the respects set forth by the petitioner in his Assignments of Error. He further states that the action of the Commissioner in disbarring the petitioner was fully warranted by the record for the reasons set forth in the Order to Show Cause issued against the petitioner, in the Commissioner's letter of May 18th, 1945 relative to the disbarment of the petitioner and

In the recommendation of the Committee on Enrollment and Disbarment, copies of which will appear in the record.

E. L. REYNOLDS,
Attorney for Respondent.

JULY 9, 1945.

Filed Dec. 4, 1945

Order

Upon consideration of the fact that this civil action was brought against Leslie Frazier, who was then Acting Commissioner of Patents, and the fact that Casper W. Ooms has succeeded to the office of Commissioner of Patents, and the fact that plaintiff desires to continue and maintain the action against said successor, now therefore it is this 4th day of December 1945,

Ordered that Casper W. Ooms, Commissioner of Patents, be and he is hereby substituted as party defendant in place of Leslie Frazer.

_____, *Justice.*

We Consent :

WILLIAM E. LEAHY,
Counsel for Petitioner.

E. L. REYNOLDS,
Counsel for The Commissioner of Patents.

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Filed Jan. 23, 1947

Memorandum

MORRIS, J. These proceedings were brought in this Court pursuant to Section 11, Title 35, U. S. C. A., and Rule 95, Title VIII of the Rules of this Court to review Orders Nos. 3937, 3938, and 3939 of Conway P. Coe, Commissioner of Patents, all dated May 18, 1945, disbarring from practice before the United States Patent Office for gross misconduct the petitioners Henry W. Carter, Vernon M. Dorsey and Roswell F. Hatch, respectively. The respondent in these proceedings here is the successor in office to the Commissioner of Patents whose action is sought to be reviewed. Upon motion of each petitioner, the order of disbarment was stayed by orders of this Court entered the 16th day of July 1945 pending review and final determination by this Court. By stipulation Volumes I, II, and III of the printed record, containing testimony and printed exhibits, and numerous other exhibits, together with briefs of counsel, transcript of arguments of counsel,

a photostat copy of report of Committee on Enrollment and Disbarment, opinion of Commissioner and copy of orders of disbarment were transmitted to this Court in lieu of a formally certified record of the proceedings in the Patent Office. Argument on the petitions for review commenced February 4, 1946 and consumed five days. Prior to arguments briefs for all parties were submitted and subsequent to the arguments a transcript thereof was received by the Court.

The proceedings in the Patent Office were initiated by a rule to show cause, directed to each of the petitioners, which read as follows:

"Whereas it was found by the Supreme Court of the United States in its decision in the case of Hazel-Atlas Glass Company v. Hartford-Empire Company, 64 S. Ct. 997 [322 U. S. 238, decided

21 May 15, 1944], that fraud was practiced on the United States Patent Office during the prosecution of the patent application of Karl E. Peiler, No. 294,792, which matured into patent No. 1,655,391 on January 3, 1928, which fraud consisted in the preparation and presentation to the United States Patent Office of an article entitled "Introduction of Automatic Glass Working Machinery; How Received by Organized Labor," naming one William P. Clarke as the author, who in fact was not the author of said article, and

"Whereas it appears from said decision and the record of the case before the Supreme Court, and the record before the United States Circuit Court of Appeals, Third Circuit, in the case of Hartford-Empire Company v. Hazel-Atlas Glass Company, 137 F. (2d) 764, and the record before the District Court Northern District of Ohio, West. Div., in the case of United States v. Hartford-Empire Company, 46 F. Supp. 541, and the records of the Patent Office, that you participated in the preparation of said article and/or the presentation thereof to the United States Patent Office during the prosecution of said patent application knowing that said article was not written by said William P. Clarke, and with the purpose of deceiving the Patent Office as to the authorship of said article and influencing the action of the Patent Office on said application; and that you thereby perpetrated or participated in the perpetration of a fraud on the United States Patent Office.

"Now, therefore, you are hereby ordered to show cause on or before November 9, 1944, why, in view of the above, you should not be suspended or excluded from further practice before the United States Patent Office for gross misconduct.

"You are hereby notified that a hearing on this order to show cause will be accorded to you before the Committee on Enrollment

ment and Disbarment of the United States Patent Office on November 9, 1944, in Room 1035 of the United States Patent Office in the Department of Commerce, 14th and E Streets NW., Washington, D. C., beginning at 10:00 A. M. on said date."

22 In addition to the three petitioners in these proceedings, who were designated as respondents in the proceedings in the Patent Office, there was another respondent, Robson D. Brown, who is now deceased.

A hearing was had before the Committee on Enrollment and Disbarment of the Patent Office, consisting of seven members, such hearing commencing November 21, 1944, and consuming five days with one night session. Each of the respondents were represented by counsel, excepting Mr. Vernon M. Dorsey, who appeared pro se. On March 27, 1945, oral argument was heard by the Committee, with Commissioner Conway P. Coe attending. The Committee, in its report to the Commissioner of Patents, dated April 26, 1945, which discussed much of the evidence in the case and set out many excerpts therefrom, stated (all members agreeing):

"As is clear from what has been stated in this report, it is our carefully considered opinion that the record made before us indubitably and conclusively shows and establishes that the respondents and each of them has been guilty of gross misconduct toward the Patent Office in connection with the so-called Clarke article, the most salient points of said misconduct being: First, the preparation and the presentation of the article to the Patent Office in such manner as to induce the Patent Office officials to believe that the article compared the commercial success of the specific invention of the Peiler application with the commercial success of the Owens machines, whereas, in truth, the comparison was of the commercial success of gob feeding machines in general—of which there were several types other than Peiler's—with the commercial success of the Owens machines; and, Secondly, the deliberate concealment from the Patent Office of the facts that (a) the so-called Clarke article was prepared by and on behalf of Hartford; (b) that the sponsorship of the article by Clarke and the notation thereon of Clark's name as author was procured by and on behalf of Hartford, and (c) that the

23 publication of the article in the National Glass Budget was procured by Hartford and on its behalf through Hatch.

We hold and believe that in the perpetration of such concealment all of the respondents deliberately collaborated not only with each other but also directly or indirectly with Clarke, and that all of the respondents connived with each other with the intention of misleading and deceiving the officials of the Patent Office as to the true state of the said material facts concerning the connection

of Hartford with the preparation and publishing of the article with Clarke's name appearing thereon as the author thereof, when in fact he was not the true author thereof, and all this for the purpose of securing favorable action by the Patent Office with respect to the claims in the Peiler application."

In its recommendation five members recommended disbarment and two members recommended that "respondents be not disbarred perpetually from practice before the Patent Office but that instead respondents and each of them be suspended from practice for a definite period of time, for instance, up to one year." The Commissioner of Patents on May 18, 1945, addressed the following memorandum opinion to all counsel and to Mr. Dorsey, who had appeared pro se:

"An order to show cause why he should not be disbarred from practice before the United States Patent Office was issued against each of the above named respondents. Answers were filed and a hearing had before the Committee on Enrollment and Disbarment of the Patent Office, at which time testimony and exhibits were introduced by the respondents. The Committee has made its report to me and in the report a majority of the Committee has recommended that all of the respondents be disbarred from practice before the Patent Office. A copy of the report is transmitted herewith.

"That a fraud was practiced on the Patent Office, as charged in the orders to show cause, was found by the Supreme Court of the United States in the case of Hazel-Atlas Company v. Hartford-Empire Co., 322 U. S. 238, 61 USPQ, 241, which was a suit to set aside the judgment of the Court of Appeals for the Third Circuit sustaining the validity of the Peiler patent No. 1,655,391, which was granted on the Peiler application referred to in the orders to show cause.

"In its Opinion in that case the Supreme Court said:

"'Here even if we consider nothing but Hartford's admission, we find a deliberately planned and carefully executed scheme to defraud not only the Patent Office but the Circuit Court of Appeals.'

"I have given careful consideration to the Committee's report and to the entire record made at the hearing and I am convinced that each of the above named respondents participated in the scheme to defraud the Patent Office, as was found by the Committee, and I approve the recommendation of the majority of the Committee, that each of the respondents be disbarred from further practice before the United States Patent Office. Orders of disbarment have this day been issued."

Each of the petitioners here assigned a great many errors, all of which have been carefully considered. It would enlarge this

opinion beyond reasonable limits to undertake to deal separately with each of such assigned errors. I shall undertake to discuss such matters as have been pressed in the briefs and oral arguments which seem to me necessary in the proper disposition on review of these proceedings.

At the outset it is of first importance to make clear the function of this Court in the present proceedings. It is not that of the trier of the facts; it is to review what has been done in the disbarment proceedings and to determine whether or not the petitioners have had a fair hearing after due notice of the
25 charge each was called upon to answer, and whether or not there is substantial evidence to support the action of the Commissioner of Patents.

Each of the petitioners contended that improper consideration was given to the several decisions and records in the cases mentioned in the rules to show cause, in which they were not parties. I am in complete agreement with the proposition that they cannot be found guilty of gross misconduct upon any evidence in any of such cases unless such evidence has been properly admitted in evidence in these proceedings. The critical part of the evidence found in the records of the other cases and introduced into evidence in the present proceedings consists of communications written or received by the several petitioners, and as to such communications it has been conceded that they were written by the persons by whom they purport to have been written, and were received by the persons to whom they were addressed. There is, therefore, no question as to the proper admission of such communications against the writers thereof, or as showing knowledge of the matters therein contained on the part of those who received such communications. Of course, it follows that the trier of the facts could draw reasonable and legitimate inferences from these facts so established.

I furthermore agree with petitioners that conclusions or findings by the courts in the cases mentioned are not a determination of any issue in these proceedings. It was for this reason that I considered the question should be resolved as to whether or not, in view of the recitation by the Commissioner of the findings by the Supreme Court in the case of Hazel-Atlas Co. v. Hartford Empire Co., the Commissioner himself had reached the conclusion that a scheme to defraud the Patent Office existed, or merely relied upon the findings of the Supreme Court that it did. There can be no doubt that the Committee did make a finding to that effect. I, therefore, addressed identic questions by letter to counsel
26 letter and at a further hearing held October 24, 1946, they stated that in effect the action of the Commissioner of

Patents was an implicit approval and adoption of the findings of the Committee, and no further action on his part was necessary to the final disposition of these cases on review.

Application Serial No. 294,792, filed by K. E. Peiler in the Patent Office May 5, 1919, sought a patent for a method of and apparatus for feeding molten glass. This application, with many vicissitudes, delays and numerous interference proceedings finally eventuated in the issuance of patent No. 1,655,391, dated January 3, 1928, to the assignee Hartford Empire Company. One after the other of the patents or alleged prior claims asserted in interference with the Peiler application were acquired by the Hartford Empire Company, and such interferences were terminated, as they were no longer of an adversary nature. The question of patentability, however, remained. Accompanying an amendment, dated October 11, 1926, there was filed, among other things, an article entitled "Introduction of Automatic Glass Working Machinery; How Received by Organized Labor, by William P. Clarke, President, American Flint Glass Workers' Union," which had been published in the National Glass Budget, a trade publication, July 17, 1926. This article undertook to show how automatic and semi-automatic machinery had increasingly displaced skilled workers in the glass industry; how it had been the policy of the union leaders to encourage such workers to acquire skill to operate the machines which were displacing the skills which they had and thus prevent their unemployment. Excerpts from reports of its officers to the Bottle Blowers' Association constitute much of the material of the article. As the reports used the term "Owens or automatic machines" to designate the automatic feeding accomplished by suction of molten glass into the molds and "flowing or pouring devices" to designate all other types of automatic or semi-automatic feeding, the article deals with
27 some emphasis on the difference between flowing or pouring devices and gob feeding. The distinction is stated in the article as follows:

"Instead of employing a stream of glass which collects in the mold until the desired mold charge had accumulated, these new feeders cut off a suspended chunk or gob of glass which was performed during suspension to correspond, to some extent, at least, to the shape of the mold cavity in which it was to be received."

The article states that such gob feeders had been put out by a number of manufacturers, including the Hartford-Fairmont Company, George E. Howard, Tucker and Reeves, W. J. Miller, and others. Excerpts from the reports above mentioned, as interpreted by comment in the article and shown by a chart, undertook to show that the production on gob feeders, which commenced in 1917, rose with great acceleration to the close of 1925, whereas pro-

duction on Owens machines, which commenced in 1905, rose until the middle of 1919 and then leveled off.

The evidence respecting the preparation, publication, and filing of the Clarke article is voluminous. Such parts of it as appears to be critical in showing connection of the several petitioners with the preparation of said article, or with the filing thereof, and its purpose are quoted in the report of the Committee and, therefore, need not be set forth in full here. Each petitioner insists that this evidence does not show any wrongful act or intent on his part, and there is much testimony on behalf of petitioners denying any inferences drawn from such evidence that they were guilty of any misconduct in connection with the Clarke article. A discussion and correspondence was had between Brown and Carter in December 1925 with respect to the desirability of having an article describing the revolution produced in the glass business by the plunger gob feeding system. Brown suggested that such an article would be

28 helpful in making a record before the Patent Office in connection with the principal Steimer case and also "in our Peiler plunger case, where we hope to obtain claims covering the broad ideas of keeping suspended mold charges shaped by the action of a plunger." He suggested that Carter write such article. Carter declined, as he did not have first-hand knowledge of the industry until 1921 and then only from the viewpoint of the patent specialist. He suggested that the article be written by Howard, who had written previous articles which were published in one of the glass journals. It is insisted in the testimony by Brown before the Committee that the article which he suggested finally became the Peiler affidavit, which dealt in detail with the various mechanical developments in the glass industry, and which was filed in the Patent Office, and had no reference to the Clarke article which was filed at the same time. In this connection, it is to be noted that Brown was resident patent counsel for Hartford and Carter was an official of the Owens Bottle Company, subsequently the Owens-Illinois Glass Company, which had a plunger licensing agreement with Hartford, whereby it had the right to use Hartford's feeder patents and to share in royalties from licenses.

Hatch, who was employed by Hartford, and had charge of the Invention Department, "which was primarily the contact between the engineers and the patent attorneys, and a number of other duties that went with it," had a conversation "not far from the beginning of 1926 and maybe a little before, or probably a little later" with Brown and secured authority to prepare an article which developed into the Clarke article. Both Hatch and Brown denied that at this time there was any intention to use such article, which was to be based upon reports of the Bottle Blowers' Union, in any patent proceedings. During the preparation of a draft by

Hatch, he sought and received information from Carter, who in May 1926 advised the president of his company that Hatch had prepared the article "with the idea of getting it printed under the name of some apparently unprejudiced authority and then calling the attention of the Patent Office Examiner to the article as published in the belief that the examiner will thereby be influenced to a more favorable consideration of Hartford's broad claims." In that memorandum Carter also stated, "Of course, we are equally interested with Hartford in securing these broad claims and, therefore, indirectly interested in getting the article published." The intention of Hatch originally was to submit the article to a Mr. Maloney, President of the Bottle Blowers' Association, to sponsor it for publication, but when Mr. Maloney declined on the ground that it might involve him with other glass manufacturers, Hatch sought to secure such sponsorship by Clarke, President of the American Flint Glass Workers' Union. Clarke would not agree unless the Owens Company, which he did not wish to offend, was agreeable thereto. In the memorandum of May 25, 1926, above referred to, Carter advised agreement with the article so that it would be sponsored by Clarke. Clarke was later advised that the Owens Company had no objection, and he agreed to go over the article, make such changes as he thought necessary, and sign it for publication.

Hatch emphatically denies that he had ever told Carter that the article prepared by him was for the purpose stated in Carter's memorandum, and Carter in his testimony admits that he has no recollection that Hatch did so, and probably had the understanding about its purpose which he did from the correspondence which he had originally had with Brown. Hatch did, however, write to Carter on March 30, 1926, in which letter, among other things, he stated that he was enclosing a carbon copy of the article which he had been preparing for publication and:

"The latest idea we have here is to persuade Mr. Maloney, the president of the Bottle Blowers' Association, to sponsor this article. I have become fairly well acquainted with him and I think there is a reasonable chance that he will do as we wish.

Of course we do not care who assumes the authorship of the article, but we want some one not associated in any way with either of our companies, and whose name would carry some slight weight in the glass trade."

In his letter to Carter of April 19, 1926, Hatch stated, among other things:

"The point I have in mind is that, if I can get the president of the association to publish this, I thought that he should base all of his statements on their printed records, except where such state-

ments had a direct bearing on the particular point which we wished to bring out."

and further in said letter:

"Of course, I think you understand that the whole object of the article is to make an excuse to get the production curves, and a few statements in regard to gob feeding into print."

Prior to the time that Maloney was asked to sponsor the article and declined to do so, Hatch had furnished a draft of the article to Dorsey, who was associated with Brown to actively prosecute the Peiler application. This was sometime in April 1926. Dorsey read the article and made only a slight change, probably two words, and returned it to Hatch. Dorsey knew that Hatch intended to ask Maloney to sign the article. Subsequently, he wired Hatch for a copy, to which Hatch replied by letter, stating that Maloney had declined to sign the article, and he had then approached Clarke. Hatch stated in that letter, among other things:

"Mr. Clarke also swallowed the labor bait which I had prepared for him and said he would be glad to revise and publish the article over his own signature if I would get assurance for him that the Owens Company would not be offended. * * *

* * * Clarke said that he would rewrite the article to a considerable extent, I suspect, and publish it in the Trade
31 Journals. I fear I may have to go out to Toledo again to get Clarke to show some speed in this matter and perhaps to supervise what he publishes. I think he understood just what we want published, but he might unintentionally destroy some of the propaganda which we planned.

"I will see that you get a copy of some Journal in which this article appears when it comes out."

After ascertaining from Maloney that he had no objection to the publication of the article, Clarke informed Hatch by telegram dated July 7, 1926, that he would "sponsor article with very slight alteration and modifications." Clarke signed the article with such slight alteration and modification sometime the next day and handed it to Hatch, who was then in Philadelphia. On July 9, 1926, Hatch wrote to Mr. Kimes, Editor of the National Glass Budget, respecting the publication of this article, in which letter he said, among other things:

"This article is prepared by Wm. P. Clarke, President of the American Glass Workers' Union. * * *

"* * * We would like to have the article appear as soon as possible and I think that Mr. Clarke will not insist on seeing a proof if it is going to take extra time.

"* * * You will understand that we do not want to have any unnecessary connection with this article as it is presented

wholly as the statement and opinion of Mr. Clarke. If there will be any expense in connection with this, please let us know what it will be."

Hatch again wrote Mr. Kimes on July 14, 19426, in which he stated, among other things:

"I have taken the matter of the reprints up with Mr. Brown, and we have decided that probably the original publications will carry a little more weight than a reprint. Therefore, we would like to have you send us fifty additional copies, making 100 in all."

32 Hatch, in his testimony, insists that at no time until a few days before the date last mentioned did he know that the Clarke article was to be filed in the Patent Office; that he did know it then, as Brown had told him that it would be so used, and it was for that reason that he used the language "the original publication will carry more weight than a reprint." He secured a copy with an attached affidavit of Mr. Kimes, dated October 8, 1926, which was forwarded by Brown to Dorsey with a letter transmitting the article and certain affidavits "intended to lay before the Patent Office certain material facts relating to the development of the type of glass feeders to which this application relates, as well as certain facts bearing upon the prior art references." This letter of transmittal to the Patent Office discusses the affidavits which were transmitted with it, and refers to the Clark article as an "interesting account of the introduction of automatic glass machinery and its reception by labor unions," stating:

"It describes the various steps by which automatic machinery was introduced, the revolution in the art accomplished by the Owens machine, the somewhat temporary effect of flow-feeding devices, and the further revolution in the art produced by the suspended-charge feeders, referred to in the Clarke article as 'gob feeders.'"

Several excerpts from the Clarke article are quoted, including the distinction made therein between "flowing and pouring devices" and "gob feeding" (already quoted in this opinion), and finally the following one:

"Disregarding, for the present, the first use of machinery in making bottles, and considering only the sudden and alarming introduction of revolutionary devices, the Bottle Blowers' Association has twice been confronted with mechanism which superseded a large amount of hand labor at each time. These crises were, first, the Owens machine, second, by gob feeders.

33 "At the present time, the bottle production of the country from automatic machinery is produced almost entirely by Owens machines and gob feeders and, as shown on the chart practically all of the annual increase in production is being made on gob feeders."

The final paragraph of the letter of transmittal reads:

"The conclusion of the whole matter is that the suspended-charge feeder has accomplished a revolution in the glass art, that it operates on principles not disclosed in the patents of the prior art, and that many of the features contributing to the success of the suspended-charge feeders are set forth in the claims of this case. It is submitted, therefore, that these claims are entitled to favorable consideration, which is respectfully solicited."

This letter of transmittal was signed by Dorsey and filed in the Patent Office October 12, 1926.

In a brief, signed by both Brown and Dorsey, in the Board of Appeals of the United States Patent Office, under the caption "the Last Step ins and Commercial Success is Persuasive of Invention," an argument is made and excerpts from adjudicated cases quoted on the weight that should be given to commercial success. Then the following comments respecting the Clarke article are made:

"That the appellant's feeders have been a tremendous success and have revolutionized the art from the standpoint of economy is recognized by reluctant witnesses. We call attention to the article by William P. Clarke, President of the Flint Glass Workers' Union (a union whose members have been displaced by the feeders in question), and published in the National Glass Budget for July 17, 1926, which is an exhibit in this case. (See Appendix, page 76.) Clarke in the exhibit in question gives a graph showing the rapid acceptance of suspended-charge feeders which he terms 'gob feeders' and stresses the great displacement of manual workers occasioned thereby. Heintzelman, an experienced manufacturer of thirty-five years' experience (see Appendix, pages 69 and 73) states that there have been revolutions in the glass feeding art in those years. The first was the introduction of the Owens' machine before alluded to, and the second was the introduction of appellant's suspended-charge feeders. The graph of Clarke shows how the introduction of the suspended-charge feeders prevented further introduction of Owens' machines."

The Clarke article, which had previously been filed, among other documents, was printed in the appendix to said brief.

On November 4, 1927, the Board of Appeals affirmed the decision of the Examiner and held the claims on appeal unpatentable over prior art references. A motion for rehearing was granted November 11, 1927, and a brief signed by Dorsey was filed December 2, 1927, to which was attached certain documents, including an affidavit of Peiler, swearing back the date of his invention prior to July 22, 1916, date of the application of the Howard patent, an affidavit of William E. Honiss, explaining the

delay in the filing of the Peiler application, and an affidavit of Howard, explaining a "disclaimer" in his patent, which had been acquired by Hartford, in which he referred to the use of a plunger in one of the old methods. Thereafter, on December 6, 1927, the Examiner was reversed and the invention held patentable with respect to all but two claims. The patent for the allowed claims issued January 3, 1928, as has already been stated.

All events subsequent to this are to be considered only as they may throw light upon the acts of the petitioners and their intent with respect to the Clarke article up to this point. Such subsequent acts may not in themselves be the basis for any charge of deception on their part practiced upon the Patent Office.

In June, following the issuance of the Peiler patent, Hartford sued Hazel-Atlas Glass Company in the District Court for the Western District of Pennsylvania for infringement. In that case

the court held that the prior disclosures precluded invention by Peiler of everything but the means by which the operation of the plunger or needle could be changed and adjusted during its operation, a feature which was not in that court's view anticipated by prior disclosures. Thus limited, the court did not consider that Hazel-Atlas had infringed the Peiler patent. While the file wrapper was introduced in evidence in that case, no consideration or comment was made either by counsel

or the court of the Clarke article. An appeal was taken by Hartford to the Circuit Court of Appeals for the Third Circuit. In the brief in that appeal by Hartford, the following is stated under the subheading "Commercial Results of This Invention:"

"We shall now point out some of the facts of record as to the commercial results of the invention of the Peiler patent.

"2. It Broke the Owens Domination. The Article by Mr. William Clarke, former President of the Glass Workers' Union (Rec. V. 592 et seq.) gives an admirable outline of the effect of the Peiler plunger feeder on the Owens machine business. His chart reproduced opposite this page (Rec. V. 602), showing the production curves of the two types of machine, speaks for itself. The Owens production line begins at zero in 1905 and goes to its high point of 12 million gross in 1919. Alongside of it the 'gob feed' (suspended-charge feed) production curve begin at zero in 1917 and goes to 9 million gross in 1925. The Owens curve practically ceases to rise after 1919, that is, as soon as there was substantially competitive production by the suspended charge or 'gob' feeders.

"In fact, the Owens Company itself began the use of the reciprocating plunger feeder in 1920 (Rec. I, 269). It is now an important licensee of the plaintiff's plunger feeders (Rec. I, 237, 289), using them in different plants (Rec. I, 289, 291). The

36 Owens Company, the largest glass producer in the country, was forced by the hard facts of actual commercial competition to recognize Peiler's system as a radical advance (Rec. V, 682, 603)."

The chart shown in the Clark article is reproduced in the brief, as stated in the foregoing quotation.

While not the counsel who made oral argument on appeal, both Dorsey and Brown were of counsel and signed the brief. This appeal was heard before Circuit Judges Buffington, Woolley and Davis, and decided May 5, 1932. Judge Buffington wrote the opinion for the Court, Judge Woolley writing a dissenting opinion. The majority sustained the broad claims of the Peiler patent and reversed the decision of the District Court. Judge Buffington traced the development of the glass industry, particularly the manufacture of narrow-neck bottle ware, from the hand method using the pontil or puntty to gather the molten glass and keep it in suspension by the manipulation of the puntty until it was deposited in the mold and sheared by another workman. He used matter contained in the Peiler affidavit and in the Clarke article to show that the first efforts to mechanize the manufacture of such glassware required a very much higher temperature and fluidity of the glass rather than the lower temperature and viscosity which were characteristic of the hand-puntty method. The pouring or flow methods had defects which were, however, largely overcome by the Owens suction method. The Owens machine was so expensive, and licenses to use them were so limited, that all but the largest manufacturers were threatened with extinction and their employees with unemployment. Judge Buffington attributed to Peiler the first and only successful method of employing mechanical means to utilize the characteristics of the glass which it had when used by the hand-puntty method. Turning to the machine covered by the patent under consideration, he made the following comment:

"This new machine and its new and differentiating elements were tersely stated in such [Clarke] article as follows: 'In-
37 stead of employing a stream of glass which collected in the mold until the desired mold charge had accumulated, these new feeders cut off a suspended chunk or gob of glass which was pre-formed during suspension to correspond, to some extent, at least, to the shape of the mold cavity in which it was to be received.'

"We shall later see that in these few words this practical glass blower official summarized the novel characteristics of the machine which is the subject-matter of this suit. And be it observed, he notes the exact differences between Owens and this new machine. Owens uses a stream of flowing glass, which means high heat and

great fluidity. The new machine uses a suspended gob, pre-formed during suspension and so pre-formed as to conform to mold shape, all of which means viscosity, nonfluidity, and less heat. It also notes that these things were done while the gob was suspended."

Judge Buffington traces the steps by which, in his opinion, Peiler had arrived at the development of the machine covered by the instant patent. There was first the paddle feeder by which a chunk or gob of viscous glass was forced over a lip of the container and sheared so as to fall in a mold. While this predetermined the quantity of glass constituting the gob, it could not pre-form it to a desired shape corresponding to the mold cavity. This was overcome by having a gob, after it was shoved over the lip of the container, fall into a connected container with a submerged orifice, the flow from such orifice being controlled by a reciprocating plunger which had the effect of pre-forming the gob so as to correspond, to some extent at least, with the cavity of the mold, and later the machine covered by the patent under consideration wherein the paddle was dispensed with, but the submerged orifice and reciprocating plunger retained. Judge Buffington concludes this part of his opinion with the following statement:

"The periodic, separated, individualized mold forms or gobs discharged by this current-intercepted process and its contrast with the continuous feed stream of the earlier art are described by the union official just referred to in language we now repeat and whose keen accuracy will be better appreciated from what has been shown in the intervening part of this opinion. Accordingly we repeat his words: 'Instead of employing a stream of glass which collected in the mold until the desired mold charge had accumulated, these new feeders cut off a suspended chunk or gob of glass which was pre-formed during suspension to correspond, to some extent, at least, to the shape of the mold cavity in which it was to be received.'"

In addition to the quotations above mentioned, Judge Buffington quoted numerous other excerpts from the Clarke article in his opinion.

Judge Woolley, in his dissenting opinion, made no reference to the Clarke article, but agreed with the District Court that all of the broad claims of Peiler had been anticipated in the prior art. He did agree with the District Court as to the validity of the narrow claim mentioned in discussion of the District Court's opinion.

Shortly after the publication of the Clarke article in the Glass Budget a Mr. William Wood, now deceased, an attorney representing the interests of the Nivison-Weiskopf Company which was manufacturing certain molten glass feeding machines which the Hartford Company claimed were infringing the Peiler paddle-

needle feeder patent and other patents owned by it, wrote Clarke and later called on him for the purpose of getting certain information which he hoped would be useful in suits then pending or threatened. Clarke testified in substance that he told him of Hatch's connection with the article, "but that it was my article." Hatch learned of this visit when he visited Clarke in Toledo on February 21, 1927, and he wrote a memorandum to Brown dated February 26, 1927, in which the following is stated:

"After getting this information, Mr. Clarke told Mr Wood
the whole history of this article, i. e., that I furnished
39 at least some of the information, and that I assisted him
in preparing the article. I do not know the exact extent to
which Mr. Clarke ascribed the article to me.

"In any event, he told Mr. Wood that he could get additional information by applying to me, and naturally I have heard nothing from Mr. Wood.

"This incident was reported to Mr. Carter of the Owens Bottle Company and to Mr. Brown on February 21, 1927."

Shortly after the decision and opinions in the Hazel-Atlas case on May 5, 1932, J. S. McCarthy called on Clarke and presented a letter of introduction from Mr. Wood. McCarthy sought information respecting the Clarke article and, either on that day or on May 24th when he returned to see Clarke, requested a photostat copy of the original article and an affidavit respecting its authorship. Clarke, in his testimony, stated that he did not like his manner and told him he would not furnish either unless summoned to court, in which event he would tell the truth. About this time Hatch sought to secure a photostat copy of the signed article, which had been returned to Clarke by the Glass Budget, and to secure from him an affidavit. Both of these were given to Hatch on May 24, 1932, in which affidavit Clarke stated that the Clarke article was published by his authority and over his signature; that, before he signed the article and released it for publication, he gave the statements set forth therein careful consideration and knew them to be true; that he signed said article and released it for publication without remuneration in the belief that a correct historical statement of the facts set forth in said article would be of interest to the glass industry. Following this Hatch wrote to Carter on May 28, 1932, as follows:

"Your information on my visit to Toledo has been rather brief, I imagine, and I thought you might like to have a little more detailed report.

"I want to state most emphatically that Mr. Clarke has fully
lived up to the statement I made about him; to the ef-
fect that he was absolutely honest and trustworthy in every
40 respect. He has been of great assistance to us, and I believe

that we are in a most satisfactory position. It does not seem wise to distribute copies of all of the papers I have, or to go into much detail in correspondence, but as you know, everything that I have is at your service if you need it.

"The assistance which you gave me the morning I arrived in Toledo was very useful, and I had to call on Mr. Naylor several times afterward. His assistance, like your own, was quite necessary.

"We are quite indebted to Mr. Clarke. While it is true that he has done nothing beyond that would be expected of any reputable man, nevertheless, without violating any confidence or doing anything of a questionable nature, he might easily have caused us a lot of trouble. This should not be forgotten, and I would like to have a general statement to this effect brought to the personal attention of Mr. Lewis.

"I have a lot of interesting things to tell you the next time I have a chance to talk to you."

On July 15, 1932, Hatch was advised by telegram from Carter that Clarke had failed to be re-elected as president of his union. Hatch wired Clarke of his regret and sought to arrange a meeting with him, which meeting was held in Toledo on July 22, 1932. Hatch, in his testimony, stated that Clarke told him about failing in his re-election, that litigation was pending against him, and that he was in a very serious financial situation and needed financial assistance, which he thought he was entitled to from Hartford in view of work which he had done in the past, and which had extended at intervals from 1925, or earlier, to 1932; that he had been put to a lot of annoyance by the activities of McCarthy; and that he had never received anything for the time put in on the Clarke article. He also stated that one of the reasons for losing the election was due to the union's objection to his having anything to do with Hartford. Hatch stated that he thought
41 there was something in what Clarke said and that he had considerable sympathy for him. Clarke said he needed \$10,000 and Hatch told him he thought that was a little bit high, but would take the matter up with his company. He did and was instructed by Brown not to make any commitment to Clarke until Hatch had seen Carter, which Hatch said he did, saying Carter agreed that a substantial amount should be paid to Clarke. Hatch stated that Brown thought Clarke should be paid something, but thought \$10,000 was too much and wanted Hatch to see if he "couldn't beat him down some." Hatch finally agreed on \$8,000, \$500 of which was paid by Hatch to Clarke in New York on August 4, 1932, and the balance of \$7,500 in Pittsburgh on August 11, 1932. At that time Clarke signed a retainer agreement for a period of five years, giving Hartford the right to his

services at an agreed compensation of \$25 a day for such days as Clarke shall at the written directions of Hartford spend in compiling data, making investigations and/or reports and testifying regarding the same. It was provided in said instrument that Clarke should not be called upon or required to render such services at times when it will interfere with other regular employment that he may have. All money was paid to Clarke in cash. The explanation for this is that any payment by check would have resulted in the money being seized by Clarke's creditors. The payments made by Hartford were charged to the accounts which were shared by Owens so that each could pay half. Clarke treated the payments as a gift and so returned them in his income tax return.

Following the decision and opinions in the Hazel-Atlas case on May 5, 1932, several motions were made extending time for motions for rehearing, during which time negotiations were being carried on which resulted in a settlement of that litigation whereby Hazel-Atlas paid to Hartford, in which Owens shared \$1,000,000, and licensing agreements were made. Announcement of this settlement was made through trade papers on or about 42 July 22, 1932. Carter, in his testimony, said that he did not authorize any particular payment of money to Clarke, though the matter had been mentioned to him, and he thought it was right in view of the value which the article had in Judge Buffington's opinion and the settlement which had been made of that suit, which resulted in the payment of \$1,000,000, and would result in the payment of several millions more. There is nothing in the evidence that connects Dorsey with the payment of any money to Clarke.

On May 31, 1933, Hartford instituted a suit against Shawkee Manufacturing Company for infringement, which resulted in a decision in favor of Hartford under the ruling in the Hazel-Atlas case. During the pendency of this case on appeal certain communications were sent to Judge Buffington by counsel for Shawkee, showing by letters from Hatch to the National Glass Budget and by the National Glass Budget to Clarke that the Clarke article had been published at the "instigation" of Hartford. Letters were also written to Judge Buffington by counsel for Hartford, who took the position then, as counsel for petitioners do in the present proceedings, that all statements in the Clarke article are true and that, therefore, no fraud had been committed by the use of the Clarke article in the Patent Office or before the Court. Numerous petitions were filed by Shawkee for leave to file various amendments and bills of review, all of which were denied, and petitions for certiorari were likewise denied.

A suit by the Government against Hartford Empire Company, Owens Illinois Glass Company, Hazel-Atlas Glass Company, and several other glass companies, charging violation of the Sherman Anti-trust Act, as amended, was commenced on December 11, 1939. During the course of that trial, much, if not substantially all, of the documentary evidence upon which the respondent in these proceedings rely first became known or available to the Patent Office. While all of the petitioners herein gave evidence in that case, either by testimony or affidavit, none of them were parties, and, of course, as has been said, are not bound by the findings of fact or conclusions of law made therein.

43 The decision in that case was rendered August 25, 1942, adverse to the defendants, which was affirmed on appeal by the Supreme Court January 8, 1945.

Predicated upon information and evidence which had been made available during the trial of the anti-trust suit, Shawkee, on October 24, 1941, and Hazel-Atlas, on November 19, 1941, filed petitions in the Circuit Court of Appeals for leave to file bills of review. Such petitions, as amended, asking the Circuit Court of Appeals to set aside their judgments on the ground of fraud, were denied, Judge Biggs dissenting. The Supreme Court on certiorari, May 15, 1944, reversed the action of the Circuit Court of Appeals in the Hazel-Atlas case, and directed that Court to set aside its judgment of May 5, 1932. Action of similar effect was taken by the Supreme Court in the Shawkee case.

The Commissioner of Patents has determined that the use in the Patent Office of the Clarke article for the purpose of influencing action on the Peiler application, prepared and published, as it was, without disclosing the participation of persons interested in the allowance of Peiler's broad claims in its preparation, was a deception practiced upon the Patent Office. He has further determined that the petitioners, registered practitioners in the Patent Office, did participate in the preparation of said article, its publication or presentation; that they did so knowing that the preparation and publication of the article was for the purpose of influencing action on the Peiler application; and that they did not intend to, and did not, disclose to the Patent Office their participation in such preparation or publication. He has therefore subjected the petitioners to the disciplinary action of disbarment.

Much testimony has been given by the three petitioners and other witnesses on their behalf, including Clarke, to show the lack of knowledge on the part of each petitioner as to the purpose for which the article was prepared, the limited extent of participation in its preparation by the several petitioners,

and the absence of any intent to deceive the Patent Office, and also to show that the Patent Office was not deceived by the use of the article. It was for the trier of the facts to determine what weight should be given to such testimony, what facts were established by other evidence properly admitted, and what reasonable inferences were to be drawn from such facts so established. I am of the view that there is ample and substantial evidence properly admitted at the hearing to support the conclusions and action of the Commissioner, as above stated.

It is urged by each of the petitioners that Clarke was in truth the author of the article and, therefore there was no misrepresentation, concealment or failure to make disclosures that should have been made to the Patent Office. It is true that Clarke did adopt, "with slight alteration," sign and authorize the publication of the article which had been drafted, with some assistance and advice from Carter and slight assistance from Dorsey, by Hatch. Clarke in his testimony states that he always considered it his article and still does. Petitioners, in effect, say that the article is nonetheless Clarke's because it was initially prepared by Hatch, and particularly so where it was understood that Clarke should have the right to revise it to any extent that he wished. That Clarke would be bound by what he signed and authorized to be published, and that he would be regarded as the author of the article in a setting other than a hearing on the Peiler application in the Patent Office is quite beside the point here. The critical point is that it was material in the consideration of such article to know that it has been substantially prepared and published by those interested in securing the allowance of the broad claims of Peiler. The analogy sought to be made with the signing of a letter by any responsible person or official that had been prepared by some one at his direction or acting for him also misses the same point, because there initial draftsmanship is ordinarily immaterial. It is also urged that Hartford's counsel, without any criticism, could have secured from Clarke a statement

45 in affidavit form of the same matter as contained in his article, even though the three petitioners had actually drafted such affidavit. The two, however, are not the same in the setting here being considered. Every implication concerning an affidavit filed by a party in support of his contentions is that the affiant made his statements at the request and on behalf of the party using his affidavit. Every implication with respect to an article published and signed by a person having no known or revealed connection with a party litigant is exactly to the contrary.

It is insisted that the Clarke article is true and, therefore, that the petitioners are not guilty of any deception in connection

therewith. The truth of the statements in the Clarke article was not an issue in these proceedings. It was expressly stated during the course of the hearings that it was not. Even though the article contained no mistakes or false statements, its weight as evidence depends as much upon its origin as its content. To exculpate petitioners from aiding and participating in the preparation of the article to be presented as the article of Clarke without disclosing their connection with its origin, it is not sufficient to say they did not make false statements in the article.

That the Clarke article was used to impress the Patent Office with the commercial success of the Peiler patent is hardly open to serious question. No other use of the article would reasonably account for its preparation, publication and presentation to the Patent Office. It is true that no mention in the article of the Peiler machine and method was made by such name. Nevertheless, it is also true that, with respect to the gob feeders, the commercial success of which was compared in the article to the commercial success of the Owens machine, it was said in the article—

"These new feeders cut off a suspended chunk or gob of glass which was pre-formed during suspension to correspond, to some extent, at least, to the shape of the mold cavity in which it was to be received."

46 That this was an implicit assimilation of the gob feeders discussed in the Clarke article and their commercial success to the Peiler patent and the machines and methods developed by him seems obvious when read in connection with the purpose of the Peiler plunger or needle feeder, as stated in the Peiler patent and application therefor—

"To avoid these defects [existing in the prior art] it is desirable to pre-form the mold charge, before it enters the mold, so that its external contour will closely approximate the interior contour of the mold walls, or at least that portion of the mold which receives the gather."

It is true that in the Clarke article it is stated that—

"This new feeder was what is now known as the gob feeder and since that time feeders operating upon this principle have been put out by a number of manufacturers, including the Hartford-Fairmont Company, George E. Howard, Tucker & Reeves, W. J. Miller and others."

It is argued that because the Clarke article mentioned manufacturers other than Hartford, there was no implication that the commercial success pointed out in the article was that of the Peiler machine and method. It is not without significance, however, that the other manufacturers mentioned specifically

made machines, the patent rights of which had been acquired by Hartford, and which came within the broad claims made by Peiler. It is urged that the Patent Office could not have been led to believe that the commercial success shown in the Clarke article related only to the Peiler invention because it was shown in Peiler's affidavit that numerous other gob feeders were in production. It must be remembered, however, that Peiler claimed to be responsible for the invention of the features which made the other machines commercially successful, and indeed stated that several competitors were paying royalties to the assignee of his patent. It does not follow that, because such an argument could be made in good faith, it was legitimate to support
47 such argument by presenting an article in the preparation of which each of the three petitioners had, to some extent at least, participated, without disclosing such participation and that its publication had been procured by the assignee of the Peiler application.

Hatch and Carter insist that they had no part in the presentation of the article to the Patent Office. Dorsey insists that he had no part in its preparation, and he and Carter insist they had no part in its publication. It is claimed, therefore, that, as no conspiracy is charged, no one of them can be held responsible for any act of the others. The essential wrongdoing is taking part either in the preparation of the article, with knowledge that it was to be used in the Patent Office, without disclosure of the part that had been taken in its preparation by any person interested in the allowance of Peiler's claims, or the making use of the article in the Patent Office, with the knowledge that it was prepared by any person interested in the allowance of Peiler's claims, without disclosure of such participation. Any such participation, with such knowledge, was an inexcusable aid to the accomplishment of a scheme to deceive the Patent Office, and was conduct falling far short of the standard which the Commissioner of Patents had a right to expect of any registered practitioner in the Patent Office. There is ample evidence against each of the petitioners to support a finding of such participation with such knowledge without resort to the rule of evidence that, where a conspiracy is proved, each conspirator is answerable for acts of the others.

It is argued at much length by the petitioners that they were found guilty of misconduct other than that charged, and thus denied due process. With this contention, I cannot agree. In my view, the charge in the rules to show cause is sufficient basis for findings which sustain the action of the Commissioner, and it sufficiently apprised the petitioners of the matters they were called upon to answer.

It is indeed tragic that the severe penalty of disbarment should be visited upon these petitioners for acts of such distance in the past. It is for this Court, however, only to say in this connection whether or not such delay constitutes a bar to the prosecution of the disbarment proceedings, or has so impaired the rights of petitioners to a fair defense that they cannot now be held accountable for their past conduct. I must answer both questions in the negative. The conduct of the petitioners called into question by the disbarment proceedings was not, nor does it appear that by reasonable diligence it could have been, known to officials of the Patent Office prior to the time that information and evidence as to such conduct became available during the trial of the case of United States against Hartford and other glass companies. After such information became known in that case and until the Hazel-Atlas and Shawnee cases were decided by the Supreme Court, the Commissioner of Patents had reasonable justification for not starting proceedings against these petitioners, whose conduct, although they were not parties to such litigation, was under consideration in said cases. No showing has been made that the delay has prejudiced the petitioners in their defense.

It is urged that disbarment of petitioners is too severe even though their conduct should be considered wrongful. That the Commissioner gave consideration to an alternate and milder discipline is quite evident from the fact that a minority of the Committee recommended only suspension. Having determined, after due notice, a fair hearing, and upon substantial evidence, that the petitioners were guilty of gross misconduct, it was in the discretion of the Commissioner to determine the proper disciplinary action in accordance with the applicable statute. I can find no abuse of such discretion here.

After full consideration of all the contentions made by each of the petitioners, many of which I do not consider necessary to discuss in this memorandum, I am of the opinion that the orders of the Commissioner of Patents here under review should be affirmed. Appropriate orders will be submitted by counsel.

JAS. W. MORRIS, *Justice*.

JANUARY 23, 1947.

Filed Feb. 12, 1947

Order

This cause came on to be heard in the January term of 1946 upon petition for review of the order of the Commissioner of

Patents disbarring the petitioner from practice before the United States Patent Office, because of gross misconduct; and upon consideration of the said petition and of the record and proceedings before the Patent Office, and of the briefs and arguments presented on behalf of the parties before the Court, it is this 12th day of Feb. 1947,

Ordered that the order of the Commissioner of Patents disbarring the petitioner from practice before the Patent Office be and the same hereby is, affirmed, and it is

Further Ordered that the said order of the Commissioner of Patents which, by order of July 16, 1945, in the above entitled cause, was stayed pending review and final determination by this Court, is stayed further, pending appeal of this case and until final determination thereof.

JAS. W. MORRIS, *Justice.*

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(Copy)

IN THE UNITED STATES PATENT OFFICE

BEFORE THE COMMITTEE ON ENROLLMENT AND DISBARMENT

In the Matters of: ROBSON D. BROWN, *respondent*, ROSWELL F. HATCH, *respondent*, VERNON M. DORSEY, *respondent*, and HENRY W. CARTER, *respondent*

Report to the Commissioner of Patents

Pursuant to orders to show cause (R. p. 3a) duly issued against each of the above-named respondents, hearings were held before the Committee on November 21, 22, 23, 24, and 25, and also final argument was heard on March 27, 1945.

At the hearings and on final argument respondent Carter was represented by Edmund P. Wood, Esquire; respondents Hatch and Brown were represented by Edgar J. Goodrich, Esquire, Albert C. Hirsch, Esquire, and Sidney F. Parham, Esquire; and respondent Dorsey appeared in his own behalf. Lloyd Williams, Esquire, a member of the firm of attorneys who represent the Owens-Illinois Glass Company, with which Carter was connected, also made a statement (R. p. 646a). Messrs. South Trimble, Jr., and Jo. Bailly Brown appeared as representatives for the Secretary of Commerce.

Each of the respondents appeared at the hearings and testified. Also, William P. Clarke and Karl E. Peiler were called and testified as witnesses on behalf of respondents

51 Brown and Hatch, and Theodore A. Hostetler was called and testified as a witness on behalf of all of the respondents. All of the witnesses were cross-examined. A considerable number of documentary exhibits were introduced in evidence.

It appears from the orders to show cause that their issuance was occasioned by the opinion in the U. S. Supreme Court case of Hazel-Atlas Glass Company v. Hartford-Empire Company, (322 U. S. 238; 64 S. Ct. 997; 567 O. G. 731). Justice Black, who delivered the opinion of the Court, said:

"In 1926 Hartford had pending an application for a patent on a machine which utilized a method of pouring glass into molds known as 'gob feeding.' * * * To help along the application, certain officials and attorneys of Hartford determined to have published in a trade journal an article signed by an ostensibly disinterested expert which would describe the 'gob feeding' device as a remarkable advance in the art of fashioning glass by machine. Accordingly these officials prepared an article entitled 'Introduction of Automatic Glass Working Machinery; How Received by Organized Labor', which referred to 'gob feeding' as one of the two 'revolutionary devices' with which workmen skilled in bottle-blowing had been confronted since they had organized. After unsuccessfully attempting to persuade the President of the Bottle Blowers Association to sign this article, the Hartford officials together with other persons called to their aid, procured the signature of one William P. Clarke, widely known as National President of the Flint Glass Workers' Union. Subsequently, in July 1926, the article was published in the National Glass Budget, and in October 1926 it was introduced as part of the record in support of the pending application in the Patent Office. January 3, 1928, the Patent Office granted the application as Patent No. 1,855,391."

52 "Here, even if we consider nothing but Hartford's sworn admissions, we find a deliberately planned and carefully executed scheme to defraud not only the Patent Office but the Circuit Court of Appeals. Cf. *Marshall v. Holmes* (141 U. S. 589). Proof of the scheme, and of its complete success up to date, is conclusive.

"Hartford's officials and lawyers thought the article material. They conceived it in an effort to persuade a hostile Patent Office to grant their patent application, and went to considerable trouble and expense to get it published. * * * The article, even if true, should have stood or fallen under the only title it could honestly have been given—that of a brief in behalf of Hartford, prepared by Hartford's agents, attorneys, and collaborators."

The orders to show cause also refer to the cases of *Hartford-Empire Company v. Hazel-Atlas Glass Company* (137 F. (2d)

764, C. C. A. 3), and *United States v. Hartford-Empire Company* (District Court, N. D., Ohio, W. Div., 46 F. Supp. 541; 55 U. S. P. Q. 14).

In the former case, Jones, C. J., stated in the majority opinion as follows:

"The article purported to be the work of one William P. Clarke, who had signed it as author, and was titled 'Introduction of Automatic Glass Machinery; How Received by Organized Labor—By William P. Clarke, President, American Flint Glass Workers Union.' After alluding to the historic opposition of glass workers to mechanical glass-blowing appliances, the so-called Clarke article went on to show that, prior to gob-feeders, the only successful automatic feeder for a glass-blowing machine had been that covered by the Owens patent, which, like another patent (Brooke), operated on the principle of stream feed into a mold (the former by suction and the latter by flow) of molten glass of high temperature and low viscosity, unlike the automatic plunger gob-feeder (Peiler's patent). Appended to the article was a chart purporting to show the ascending curve of the increased glass bottle production from the use of gob-feeders from 1917 onward, and the almost concomitant flattening of the production curve of manufacture under the Owens patent which, up to that time, had increased both continuously and regularly.

"The fact is that article had not been written by Clarke, but by one R. F. Hatch, an attorney in the patent department of Hartford, which by that time had become the assignee of the Peiler patent application. Hatch not only prepared the article and its accompanying chart but he also procured Clarke's signature thereto as the author, and caused it to be published in the *National Glass Budget* with the understanding, assented to by the publisher, that Hartford should not be connected with it. The article appeared in the July 17, 1926 issue of the *National Glass Budget*. R. D. Brown, Vice-President and Patent Counsel of Hartford, and V. M. Dorsey, a patent attorney for Hartford, brought the published article to the attention of the Patent Office on October 12, (sic) 1926, with special reference to the Peiler application (Serial No. 294,792), whereon the patent (No. 1,655,391) issued on January 3, 1928.

"It is unnecessary for present purposes to relate in detail how Hatch, aided and abetted by Brown and Dorsey as well as by H. W. Carter, of Owens Bottle Company, deliberately set about 'to get the production curve and a few statements in regard to gob feeding into print' (from a source ostensibly hostile to labor-

saving glass-blowing machinery) for use in the Patent Office in connection with the Peiler application which had already been rejected on the ground that its claims were not patentable. As the matter then stood, the Peiler application was confronted with apparently insurmountable Patent Office opposition. That Hatch, Hartford's employee, and not Clarke, the labor leader, wrote the article and that the purpose of the methods employed in having it published was as above indicated may now be taken as indisputably established.

* * * *

Judge Biggs, in his opinion, said:

"* * * the most important element of the fraud must be pointed out. It consists of nothing less than this. Apparently at no place in the proceedings of the Bottle
54 Blowers Association, to which Hatch referred, was any reference made to gob-feeders; viz, to devices such as Peiler's. The assimilation of gob-feeders such as Peiler's to the proceedings of the Bottle Blowers Association, when those proceedings in fact make no reference to them, is the heart and essence of the fraud. The fabrication was necessary to tie the Peiler device into the proceedings of the Bottle Blowers Association and thus, to deceive the Patent Office."

In his opinion in the District Court case, Kloebe, District Judge, stated as follows:

"For a number of years Hartford had on file in the Patent Office its so-called Peiler 'stuffing' application, by means of which it hoped to dominate the gob feeding art. The Tucker, Reeves & Beatty and the Miller feeders were competing with Hartford's feeders. Immediately after the April, 1924, agreement between Hartford and Owens, steps were taken which resulted in the acquisition by Hartford of Tucker, Reeves & Beatty and of Miller, with the financial and legal assistance of Owens. After these acquisitions had been accomplished, the Peiler stuffing application was released from the Patent Office interferences with these acquired applications. The Patent Office was still opposed to the issuance of a patent holding such broad claims as those contained in the Peiler application. Steps were taken by Hartford and Owens to change the position of the Patent Office in this regard, and one of these steps was the joint preparation of an article, to be signed by some apparently unprejudiced authority and to be published in some magazine of large circulation in the glass industry, for the purpose of bringing it to the attention of the Patent Office and thereby influencing it to issue the patent with the broad claims sought by Peiler. This article was written by R. M. (F.) Hatch of Hartford, acting in conjunction with R. D.

Brown of Hartford, and under the critical eye of V. M. Dorsey of Hartford and H. W. Carter of Owens.

* * * * *

"Hatch procured one W. P. Clarke, then president of the American Flint Glass Workers Union, to sign this article, under
55 the pretense that it bore his authorship and in payment therefor Clarke was later given the sum of \$8,000 in cash by Hatch. This payment was shared by Owens and was charged upon the books of Hartford as going to 'attorneys fees.'

"The article was published in the July 17, 1926, number of 'National Glass Budget' and was entitled 'Introduction of Automatic Glass Machinery; How Received by Organized Labor—by William P. Clarke, President, American Flint Glass Workers Union.'

"On October 11, 1926, the article was cited to the Patent Office by V. M. Dorsey of Hartford. The attention of the Office was called to the article as evidence that the Hartford feeders had been a great success, but the Patent Office was never apprised of the fact that Hatch, with the assistance of Brown, Dorsey and Carter, was the real author of the article.

"On January 13, (sic) 1928, the Peiler stuffing patent application was allowed by the Patent Office and a patent (1,655,391) was issued to Hartford which contained the broad claims that it sought over the gob feeding art."

The relations of the respondents to the Hartford-Empire Company, which will hereinafter be referred to as Hartford, are as follows:

Robeson D. Brown was formerly a member of the Examining Corps of the Patent Office and is an attorney at law. He is now Vice President of and Patent Counsel for Hartford and has been its resident Patent Counsel in Hartford since 1924.

Roswell F. Hatch is registered to practice before the Patent Office and has been employed by Hartford since April 1, 1920. He has charge of Hartford's Invention Department (D. Ex.-B, p. 31; Ex. HB-67, p. 3177; R. p. 470a; R. p. 473a).

Henry W. Carter was formerly a member of the Examining Corps of the Patent Office and is an attorney at law. He is now retired, but was employed by The Owens Bottle Co., now known as Owens-Illinois Glass Co., from 1920 to 1934. He was made

Treasurer of The Owens Bottle Co. in 1926 and Vice
56 President of Owens-Illinois Glass Co. in 1930. These companies will hereinafter be referred to as Owens. By a cross-licensing settlement agreement dated April 9, 1924, Owens was granted rights under Hartford's feeder patents (R. p. 599a).

Vernon M. Dorsey is an attorney-at-law and, as patent counsel for Hartford, was associated with Brown to actively prosecute

the Peiler application. He was also a member of the Board of Directors of Hartford.

Counsel for Brown and Hatch stated at the hearings that the facts on which this proceeding is based have been in the possession of the Government since 1938. However, they have not been in possession of the Patent Office since that date. The facts underlying the orders to show cause are understood to have been first brought to light in 1941 by evidence and testimony introduced at the trial of *United States vs. Hartford*, cited, in anti-trust prosecution begun December 11, 1939; and the Office did not feel justified in taking any action in the premises until after the respondents had full opportunity to take such steps in the cases cited as to them might have seemed appropriate and as may have been permitted to them, and particularly after a petition for rehearing filed in the *Hazel-Atlas* case, cited, had been denied by the Supreme Court on June 12, 1944.

The Committee has not concerned itself with whether the records in *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, (322 U. S. 238, 64 S. Ct. 997, 567 O. G. 731), and *Shawkee Mfg. Co. et al v. Hartford-Empire Co.* (322 U. S. 271, 64 S. Ct. 1015, 567 O. G. 169), which were respectively introduced as Department's Exhibits B and C, do or do not support the assertions and findings made by the judges in their opinions. The Committee has approached the matter from a different angle.

Testimony and proofs have been taken before the Committee and received *de novo*; the records from the cases last mentioned having been received in evidence, with the consent of respondents only to the extent that they contain written evidence in the form of admissions and certain other papers herein-
 57 after identified as having been signed, sent, or received by these respondents as they purport to have been. It was stipulated on behalf of respondents Brown, Hatch, and Carter (R. pp. 462a, 522a, and 634a), during the proceedings that letters included in said court records were written, sent, or received as indicated by the letters, but said letters were not to be accepted as proof of the facts stated therein, except as they contained admissions by the writers thereof.

Although the question of fraud and deception by Hartford was in issue and a matter adjudicated in the cases mentioned in the orders to show cause, the respondents here were not parties individually in any of those cases and their personal guilt or innocence in connection with fraud chargeable to Hartford was not a direct issue in any of the cases.

Accordingly, the proceedings here were conducted as an original proceeding, placing in direct issue for the first time the questions of personal fraud and deception stated in the orders to show

cause, and with full and complete opportunity accorded respondents, and each of them, to introduce any pertinent and relevant testimony and proofs they saw fit to introduce, and each respondent was accorded the right to cross-examine any and all witnesses called on behalf of any of the other respondents.

Most of the essential facts involved in this proceeding are not controverted.

In the latter part of 1925, Carter discussed with Brown (R. pp. 352a, 353a, 455a, and 600a) and Brown discussed with Dorsey (R. p. 353a) their interest in having an article prepared and signed by "some competent authority and placed before the Examiner" relating to gob feeders for filing in the Peiler application. By December 11 of that year Brown was not particularly interested in who signed the article so long as it would be filed in the Patent Office, as evidenced by his letter to Carter of that date (Ex.

C-70-1, R. p. 743a; D. Ex. B, p. 40), reading as follows: 58.

"The other day in Washington we discussed in rather a joking way, the possibility that you might write up an article describing the revolution produced in the glass business by the plunger gob feeding system. The more I think of this the better the idea seems and I am writing to enquire whether you would seriously care to undertake the preparation of such article to be signed either by yourself or someone else.

"As you will no doubt recall, the importance of this matter lies in the fact that we must soon make a record before the Patent Office, in connection with the principal Steimer case and also in our Peiler plunger case, where we hope to obtain claims, covering the broad ideas of keeping suspended mold charges shaped by the action of a plunger."

Although Carter was equally interested with Brown in securing the allowance of broad claims in the Peiler application (Ex. C-70-7, R. p. 763a), because of the rights Owens had in Hartford's feeder patents under the 1924 agreement, yet he declined to write an article (Ex. C-70-2, R. p. 744a) on the ground that he had no first-hand knowledge of the facts involved and suggested that a person by the name of Howard, whom Brown identified as a Hartford engineer, had published an article four years previously which might be expanded into what Brown had in mind. This suggestion was not adopted.

Soon (early in January 1926) after Brown's letter to Carter, Hatch, who reported to and consulted with Brown as his superior officer in the Hartford organization on matters of policy affecting patents (R. pp. 347-8a, 470a, 538-9a, 573a), commenced the preparation of an article relating to automatic glass machines. It was admitted by Hatch (R. p. 531a) that the principal object of the article was to make a comparison "between the commercial

success of the Owens suction machine and feeders of the gob type". In the preparation of the article, Hatch consulted both Dorsey and Carter as well as the Reports of the Annual Conventions of the Glass Bottle Blowers Association (a labor union) and various other publications.

59 Hatch completed his task of writing the article early in 1926. In its finished form and as subsequently published, it mentions the Glass Bottle Blowers Association by name. In fact, it was drafted largely from the reports of the conventions of that association and quotes from such reports. As stated by Hatch in a letter to Dorsey, dated May 20, 1926 (Ex. D-72-C, R. p. 759a) this was done to provide "bait" (R. p. 759a) to be held out to induce a labor leader named James Maloney, who was President of the Glass Bottle Blowers Association, to sign the article. Carter also was fully informed about these matters. By letter dated March 15, 1926 (D. Ex. G), addressed to Carter, Hatch said:

"The present plan is (of course this is not for publication) that I shall attempt to get the president of The Glass Bottle Blowers Association to publish the article which we desire. Therefore I am writing something which will look good for organized labor and I am in hopes that we can get away with it."

Hatch again wrote Carter on March 30, 1926 (D. Ex. H), as follows:

"I enclose a carbon copy of the article which I have been preparing for publication. The latest idea we have here is to persuade Mr. Maloney, the president of the Bottle Blowers Association to sponsor this article. I have become fairly well acquainted with him, and I think there is a reasonable chance that he will do as we wish. Of course, we do not care who assumes the authorship of the article, but we want some one not associated in any way with either of our companies, and whose name would carry some slight weight in the glass trade.

"With this in view I have become temporarily, at least, quite enthusiastic over organized labor. My idea is that I can show this article to Mr. Maloney to illustrate the favorable statements that he can make in regard to organized labor, which, of course, we expect to appeal to him. I expect him to revise the article enough so that he can claim to be the author at least, 60 and as much more as he may desire, but under my supervision. Of course, I may not be able to get away with this scheme at all, but I think there is a fair chance.

"In the carbon which I am sending you, I have made a number of notes in red on which I would particularly like your advice. In fact, I hope you will feel free to make as many suggestions or changes as occur to you, because I have not attempted to put this into final polished form, and I am well aware of many oppor-

tunities for improvement. I intend to leave it so that Maloney can use his own phraseology so far as he sees fit. I believe, I told you that he has a prejudice to anyone connected with colleges in any way, and perhaps the condition in which I submit this to him will convince him that I have never had the advantage of any small part of a college education.

"Some of the places in this draft I have marked simply with a question mark. This means that I doubt whether the parts so marked should be used as written. Perhaps you would like to write your comments in the margin of the draft and return it to me.

"There is a lot of stuff in this article about which Maloney knows nothing, but if he will accept the doubtful honor of pater-nity of the article, I intend to educate him so that he will know the source of all statements made. For instance, on page 5 I have inserted a reference to the Brady testimony in Brooke versus Hartford-Fairmont, but this would not be printed in the article. However, I want to show this testimony to Maloney.

"The production on the Brooke Flow Device is so insignificant compared to the others that I would like to omit it, but I do not see how this could be done on account of the excitement that the first introduction of the device created among the bottle blowers. Moreover the peculiar phraseology which they use calling all glass feeders 'flow or pouring' devices makes it necessary to show the origin of this term."

In compliance with Hatch's request, Carter severely criticized (Ex. C-70-3, R. p. 745a) the accuracy of the article and suggested important changes therein. Hatch replied to Carter's criticisms and suggestions on April 19, 1926 (Ex. C-70-4, R. p. 754a, D. Ex. B, p. 40), and again on April 28, 1926 (Ex. C-70-5, R. p. 756a, D. Ex. B, p. 124). His letter of April 19 reads as follows:

"I received this morning your letter relating to my proposed article on 'Feeding'. I appreciate your comments very much indeed and I think there is but one point on which you failed to appreciate my exact position. That is, I prepared this article so far as possible with reference only to the proceedings of The Bottle Blowers Association, and knowingly and intentionally I reproduced some of the errors found therein.

"For example, in any statement as to the number of Owens machines in use, I have used the numbers given in the proceedings, even when I knew this was not correct. The point I have in mind is that if I can get the President of the Association to publish this I thought that he should base all of his statements on their printed records except where such statements had a direct bearing on the particular point which we wished to bring out.

"I fully appreciate your remarks on the 'Brooke Flow', but I thought it necessary to go into this because page after page of the proceedings is taken up with the discussion of this device. In fact, it came close to causing as much discussion as did the Owens machine. Another reason for considering the Brooke Flow is the fact that the name which they have used throughout all of their proceedings, even up to date, comes from the Brooke device. That is they call their feeders 'Pouring' or 'Flow' devices. As I recall it the expression 'Gob Feeders' does not occur anywhere in the entire report.

"I shall go over this again and I hope to be able to cut down on the space given to the Brookes Flow. In fact in view of your suggestion, I think I can make considerable improvement in the article and still base all statements on information published in the proceedings of The Glass Blowers Ass'n.

"It is my present intention to revise the article in view of your comments and others which I expect to receive from Mr. Dorsey and then see what I can do with President Maloney.

62 I feel sure that after such revision there will be nothing objectionable to you so that I need not hesitate in letting it appear in print, if I can make the necessary arrangement. Of course I think you understand that the whole object of the article is to make an excuse to get the production curves and a few statements in regard to gob feeding into print.

"I certainly appreciate your comments and thank you for your kind assistance."

In his supplemental letter to Carter dated April 28, Hatch said:

"I have just gone over your letter of April 17th, in regard to the gob feeding article which I am preparing and I have fortified the proposed article considerably in view of your comments. I should like to write an article which would be historically correct in all details but considering the place where I hope to get this adopted I felt that I must go back closely on the information provided by their own records."

Brown was likewise informed, and he authorized Hatch to "go ahead" (R. pp. 356a, 417a, 418a, 474a).

Hatch also provided Dorsey with a manuscript copy of his article (R. p. 485a). Dorsey made two or three minor corrections in the manuscript and returned it to Hatch. Dorsey knew that Hatch intended to ask Maloney to sign the article, and he desired a copy when signed for filing in the Peiler application. Subsequently, he wired Hatch for a copy. Hatch replied on May 20, 1926 (Ex. D-72-C, R. p. 759a), as follows:

"You flatter me again by wiring for a copy of the so-called 'Maloney' article. I enclose one of the original drafts which I

made and you will understand that Mr. Maloney will never appear in connection with this article in any way. Moreover, when the article appears in print, it will probably be changed considerably from the present form.

63 "I do not know whether I told you that Mr. Maloney refused to publish the article over his name for fear of some unknown complication with some manufacturer with whom he may have to do business. I cannot see any possibility of any embarrassment to Mr. Maloney if he should publish the article, but I could not get that idea out of his head. Nevertheless, he said that he approved heartily of the article and would like to see it published. Moreover, he knew from his personal knowledge that every statement in it was accurate.

"As a result of this, I went to see Mr. William P. Clarke of Toledo, the President of the American Flint Glass Workers' Union. Mr. Clarke also swallowed the labor bait which I had prepared for him and said he would be glad to revise and publish the article over his own signature if I would get assurance for him that the Owens Company would not be offended. Of course I knew unofficially that there would be no offense and I finally arranged with Mr. Carter to have McNerney give my draft to Clarke, which will probably put his mind at rest, as McNerney is Assistant Secretary of the Owens Company and a Director of the American Bank, of which Clarke is President.

"It was quite amusing to hear Clarke imply that Maloney was a 'liar'. I explained to Clarke that that might be so but I had based my statements on printed publications which I accepted without question. Clarke said that he would rewrite the article to a considerable extent, I suspect, and publish it in the Trade Journals. I fear I may have to go out to Toledo again to get Clarke to show some speed in this matter and perhaps to supervise what he publishes. I think he understood just what we want published, but he might unintentionally destroy some of the propaganda which we planned.

"I will see that you get a copy of some Journal in which this article appears when it comes out.

"Incidentally, when I was feeling rather discouraged on getting the labor article published, I had the idea of getting Jack Arbogast to write a history of his father's connection with the glass business. I am told that Jack is more or less of a loafer but would be interested in such a history and I was quite amused to think such a history would of necessity be strongly
64 antilabor. In view of the nice labor article I had just prepared, I should hate to see both of these articles (should the second one be published) appear over my name because my union friends would certainly be very sore."

After revising the article somewhat in view of Carter's criticisms, Hatch presented it to Maloney and asked him to sponsor it. Although Maloney was President of the Glass Bottle Blowers Association and the article was for the most part drafted from the reports of the conventions of that association and frequently refers to such reports, Maloney declined to do so; whereupon Hatch presented it to Clarke, President of Flint, who was a total stranger to Hatch (Ex. HB-67, p. 3101-2), with a like request. Clarke consented to sponsor the article provided that by so doing he would not offend Owens, and Owens through John H. McNerney, its Assistant Secretary-Treasurer, was so informed by Clarke in a letter dated May 27, 1926 (Ex. HB-3, R. p. 765a), reading as follows:

"I am enclosing herewith a self-explanatory letter received from Mr. R. F. Hatch of the Hartford-Empire Company, along with a carbon copy of my reply. This man called on me a few weeks ago with a prepared article for which he asked me to stand sponsor. I refused to do so unless he would present a letter from Mr. Boshart, President of The Owens Bottle Company, saying that it would be agreeable to the Owens Company to have such an article published. From the tone of Mr. Hatch's letter I take it for granted that you were to bring the matter to my attention."

This letter was replied to by Carter on June 10, 1926 (Ex. HB-5, R. p. 762a; D. Ex. B, p. 129), as follows:

"Mr. McNerney has referred to me your letter of May 27, enclosing letter from Mr. Hatch of the Hartford-Empire Company, Hartford, Conn.

65 "Mr. Hatch had previously submitted his proposed article to us, as he no doubt told you, and we have had the matter up with Mr. Boshart, in person, since hearing from you.

"Mr. Boshart authorizes me to say that while the copy of proposed article submitted by Mr. Hatch seems to wobble a bit in places, he sees no objection to it as a general proposition, and so far as this company is concerned, you may feel quite free to co-operate in the publication of such an article to any extent you see fit.

"We are handing you herewith the copy submitted to us by Mr. Hatch, with certain corrections noted in pencil. These are by way of suggestion merely, and we ask you to feel entirely free to alter or ignore them in your discretion.

"Even with these corrections, we would not wish to be understood as vouching for the historical accuracy of all the statements made. But we would probably agree that in respect to its main theme—the extraordinary development of gob feeder operations during the last ten years, it is substantially correct.

"In behalf of Mr. Hatch, we would add that you will find him entirely trustworthy and may confidentially rely on any statements he may make."

As indicated in the foregoing letter, one of the Owens executives to whose attention Carter had brought the article was W. H. Boshart, its President. Under date of May 25, 1926 (Ex. C-70-7, R. p. 763a; D. Ex. B, p. 41), Carter addressed a memorandum to Boshart in which he said in part:

"It occurs to me that I should make myself more clear about the purpose of this Hatch article.

"He has prepared it with the idea of getting it printed under the name of some apparently unprejudiced authority, and then calling the attention of the Patent Office Examiner to the article as published, in the belief that the Examiner will thereby be influenced to a more favorable consideration of Hartford's broad claims.

66 "Under the circumstances, I do not see that we need be very critical of our treatment in the article. If not too rank, would say that we better let it go through. Of course any particular statements can be corrected or cut out."

Testimony presented to the Committee established that Clarke, who had no official connection with the Glass Bottle Blowers Association, did not desire to offend the officers of that association by signing the article. In a letter addressed to Maloney under date of June 30, 1926 (Ex. HB-7, R. p. 774a; D. Ex. B, p. 130), Clarke admitted that Hatch had presented him with a manuscript of the article for his sponsorship and sought Maloney's approval in the following terms:

"If there is nothing in the manuscript to which you or your organization would take exception, then, with slight modification, I am willing to stand sponsor for the article but I will not do this unless it is agreeable to the officers of the Glass Bottle Blowers Association."

Maloney gave the requested consent (Ex. HB-8, R. p. 777a; D. Ex. B, p. 131), whereupon Clarke immediately informed Hatch by telegram dated July 7, 1926 (Ex. HB-10, R. p. 778a; D. Ex. B, p. 132), that he would "sponsor article with very slight alteration and modification." Clarke signed the article sometime the next day, and handed it to Hatch, who was then in Philadelphia, and the latter forwarded it without delay to the editor of the National Glass Budget with the request that it be published promptly. At the same time Hatch advised the editor of the National Glass Budget that Clarke would "not insist on seeing a proof if it is going to take extra time" (R. p. 543a). As heretofore stated, the

article appeared in the July 17, 1926, issue of the journal mentioned and a copy of the article as printed was presented by Dorsey and Brown to the Patent Office as a part of an amendment dated October 11, 1926 (Ex. HB-61, R. p. 815a), in the Peiler application and later made use of by them in a brief (D. Ex. E, p. 477) filed with the Board of Appeals.

67 All the respondents knew that the article was to be presented to the Patent Office in a disguise carefully planned by them to conceal from the Patent Office the facts that it was instigated by and prepared on behalf of Hartford; that Clarke or some other labor leader was to be or had been induced to sign the article, and that it was to be published in a printed publication and subsequently filed in the Peiler application; the whole procedure being purposely intended and deliberately designed to lead the officials of the Patent Office to believe that Hartford had no connection whatsoever with either the instigation or preparation of the article, or with the appearance thereon of Clarke's name as its author, or with its publication in the National Glass Budget; the purpose of this concealment being expressed by Mr. Carter in his affidavit, which was presented as his direct testimony, as follows (R. p. 602a):

"I recognized that an article published by a disinterested man would be less apt to be discounted than an article published by an interested party, and it was my desire at the time that the Patent Office be presented with an accurate statement of fact which would not be ignored as a mere self-serving declaration."

Furthermore, Brown, Hatch and Dorsey testified as follows:

BROWN

"In May—I can fix that approximately—in May of 1926, Mr. Hatch told me that he had been talking to Mr. Clarke about his idea that a union labor article about machinery might well be printed, and Mr. Clarke had taken the draft that Hatch had given to him and was going to revise it and publish it (R. p. 356a).

"That, I should say, not from recollection but from the other papers we have here, must have been in July of 1926, and what Mr. Hatch told me then was that he had the article all signed up by Mr. Clarke and that Mr. Clarke had gone over it and checked it up, and made some changes, the nature of which I did not know, but had made some, and had released it to be published.

68 "One thing I do remember, that about that time I asked Hatch when it was coming out, and I know I asked him that because I had it in mind that it might be a good thing to add to our Patent Office showing" (R. p. 357a).

HATCH

"Q. So, about that time is the first time you knew the article was to be filed in the Patent Office?

"A. I would like to read one sentence here by which I established the date. 'I have taken the matter of the reprints up with Mr. Brown and we have decided that probably the original publications will carry a little more weight than a reprint.' Now, what I was referring to by 'carrying more weight' was for the purpose of submitting to the Patent Office, and the first I knew about it was shortly before that date, so it was probably about a week before it was published.

"Q. And how did you learn of the fact that the article was to be filed in the Patent Office?

"A. Mr. Brown told me.

"Q. Did you do anything else in connection with that?

"A. Yes; he asked me if it was published to get Mr. Kimes of the Glass Budget to certify a copy for the purpose of filing in the Patent Office, which I did" (R. pp. 490-491a).

"Q. Mr. Hatch, did you consider yourself under any duty to have made a disclosure to the Patent Office at the time that article was filed, to disclose your part in the gathering of the material and the preparation of the article?

"A. Absolutely none whatever. The article was true. I don't care what anybody says about it, it was true" (R. p. 491a).

DORSEY

"Q. 'When the manuscript for the "Clarke article" was presented to me, I found therein a true statement of such facts as I desired to present to the Patent Office.'

"Is that true?

"A. That is correct.

"Q. And whether it was the first draft or the second draft you approved it at that time?

69 "A. I approved the first draft. I don't think I approved anything else. The article was published, and after it was published I checked through it and found it substantially true and thought it was useful to put in the Patent Office.

"Q. To go on with the paragraph:

"At my request a copy of the National Glass Budget containing said article, authenticated by an affidavit of the publisher, was obtained and filed in the record of the above-identified Peiler application.'

"A. There was such an affidavit filed, and I guess it was obtained at my request.

"Q. You say it was?

"A. I say it was, but I wonder if Mr. Brown thought of getting the authentication. I am a little hazy on that" (R. p. 656a).

"Q. Your testimony, as I understand it, to this Board is that when you filed the Clarke article in the Patent Office, you connected it in no way whatever with the Hatch article?

"A. Oh, it was connected. It was certainly connected. The Clarke article certainly had the basis of the manuscript that Hatch had sent me. There is no question about that in my mind. How close they were, I don't know" (R. p. 660a).

"Q. Did you regard the substance—I believe that is your word—or contents, whichever you prefer, of the Clarke article as being material and relevant to any question that was properly before the examiner in connection with this Peiler application?

"A. I certainly so regarded it when I filed the Clarke article with the examiner. I wouldn't have filed it unless I thought it was" (R. pp. 670a, 671a).

"Q. I have just one or two more questions. As a test of your sense of professional obligations and duty to the Patent Office, you still think it would be fair to have an article prepared by an employee of your company, and then have it signed by somebody who did no more than make minor revisions in it, that person being a person who could give weight to the article, and then to file it in the Patent Office without disclosing the connection of your company in its preparation?

"A. If that man was a reputable person whose name would carry weight, and the article submitted by the employee of my company was so perfect that it could not be bettered by the expert, I don't see any reason why I should not have filed it" (R. pp. 675a, 676a).

Although all of the respondents admitted they knew before the article was filed in the Peiler application that it was to be filed therein, yet there is no evidence that either or any of them ever disclosed to the Patent Office, prior to the hearing before this Committee, that the article was inspired and written by Hatch, and there is no evidence that the Office had any information or knowledge of the true origin of the article until after the publication of the decisions hereinbefore cited.

Considering the article itself, it begins by discussing the apparent conflict of interest between the manufacturer and organized labor whenever new labor-saving machines are introduced in industry and points out that it has always been the policy of the

Glass Bottle Blowers Association to encourage its members to acquire new skills to operate the machines instead of opposing their adoption. There follows what purports to be an outline in chronological order of the methods and machines which have been adopted for making glass bottles, starting with the hand punty method and ending with the latest machines known as gob feeders. Intermediate mechanisms in the development of the art are said to be semiautomatic machines; the Owens machine, which draws or sucks the molten glass for the mold charge upwardly from the tank directly into the mold; and the Brooke flowing device, which pours a stream of glass into the mold.

Forming a part of the article is a graph purporting to show substantially all the bottle production of the country from
71 Owens machines and gob feeders, and that practically all of the annual increase in production is being made on gob feeders. The article thus emphasizes the superior utility and commercial success of gob feeders as a class of inventions, of which there were several produced by different manufacturers, at the time the article was filed in the Office, as we are now informed and as will later appear.

Although the article *prima facie* discusses the superiority and commercial success of gob feeders generally, yet it was presented to the Office as relating only to Peiler's latest invention as disclosed in his application then being considered by the Examiner, which invention employs a plunger to "stuff" or fatten the hanging charge by plunger action to shape it in suspension before shearing it in suspension.

Promptly after the publisher of the article had been hurried to print it, Dorsey and Brown filed an amendment in the Peiler application. From the standpoint of practice, this action on their part was timely, for the Examiner was on the verge of finally rejecting all of the claims in that application. In view of this fact and of the use made of the article, there is little room to speculate why there was a rush to get the article in print. To be of maximum effectiveness it was necessary for the article to be made of record in the Peiler application before a final rejection was entered therein.

The amendment referred to was dated July 31, 1926 (D. Ex. E, p. 226), and it was stated therein that "a discussion of the subject-matter of this case is being prepared, with affidavits and exhibits, showing the widespread recognition by the glass art of the novelty and great value of the features claimed herein, particularly the feature of shaping mold charges by the plunger action which is characteristic of this invention." In that amendment the prior art relied upon is deprecated and the Peiler feeder is represented

by comparison as being the only commercially successful gob feeder in the following words:

72 "In this reconsideration of this case, the Examiner is asked to note, and to keep in mind, that the modern plunger glass feeder has thoroughly revolutionized the glass-feeding art, and that the prior art back of this feeder, *as this modern feeder is exemplified in the present case*, consists mainly, if not wholly, of paper proposals which have made no impress whatever upon the practical art. *So far as we know, there is not a single reference in the record of this case which has ever been embodied in a commercial glass feeder delivering charges cut off in suspension, except one prior patent to this applicant himself.*" [Italics added.]

By this approach, apparently the point was sought to be made that, with the exception of one other invention made by Peiler, his invention as disclosed in his pending application and especially "the features claimed herein" was the only successful feeder delivering charges cut off in suspension, which is merely one type of gob feeder. In the supplemental amendment dated October 11, 1926 (D. Ex. E, p. 261), the article was indirectly used in support of that point. In such amendment, Dorsey and Brown said that "we submit herewith a number of affidavits and exhibits intended to lay before the Patent Office certain material facts relating to the development of the type of glass feeders to which this application relates * * *." One of such exhibits was the article, which was argued and quoted from at length, special emphasis being placed on the "revolution in the art produced by the suspended charge-feeders, referred to in the Clarke article as 'gob feeders'".

Arranging the argument in form, and supplying the obvious conclusion to be derived from it, we have: Feeders delivering charges cut off in suspension (gob feeders) attained such commercial success as to produce a revolution in the art; Peiler invented the only feature embodied in all commercially successful feeder delivering charges cut off in suspension (gob feeder); and, therefore, Peiler's invention produced the revolution in the art. That this is the conclusion it was desired the Office to draw is made clear by the brief (D. Ex. E, p. 477; R. p. 375a) subsequently filed with the Board of Appeals, wherein all pre-
73 tense is laid aside that the article refers to any commercially successful gob feeder other than to Peiler's. In that brief it is said:

"That the appellant's feeders have been a tremendous success and have revolutionized the art from the standpoint of economy is recognized by reluctant witnesses. We call attention to the article by William P. Clarke, President of the Flint Glass Workers'

Union (a union whose members have been displaced by the feeders in question), and published in the National Glass Budget for July 17, 1926, which is an exhibit in this case. (See appendix, page 76.) Clarke in the exhibit in question gives a graph showing the rapid acceptance of suspended charge feeders which he terms 'gob feeders' and stresses the great displacement of manual workers occasioned thereby. Heintzelman, an experienced manufacturer of 35 years' experience (see appendix pages 69 and 73), states that there have been revolutions in the glass feeding art in those years. *The first was the introduction of the Owens machine before alluded to, and the second was the introduction of appellant's suspended charge feeders.* The graph of Clarke shows how the introduction of the suspended charge feeders prevented further introduction of Owens machines." [Italics added.]

From Hatch's letter to Carter dated March 30, 1926, and by testimony before this committee (R. pp. 516a, 517a, and 534a), it becomes unmistakably clear that these respondents knew that gob feeders other than the one disclosed in Peiler's pending application had attained considerable commercial success long before the amendments and brief identified above were filed in the Patent Office. Among the manufacturers of such feeders were Tucker and Reeves, George E. Howard, and W. J. Miller. Peiler's application was involved in interference not only with the applications of Miller (now patent No. 1,642,967) and Tucker and Reeves, but also with the applications of Howard, Steimer (now patent No. 2,073,571), Bridges (now patent No. 1,590,924), Lott, and others also disclosing gob feeders of the type which deliver
 74 charges cut off in suspension (D. Ex. H; Ex. C-70-9, R. p. 731a; Ex. HB-15, R. p. 801a). Many of these feeders also employed plungers. In fact, it is stated in respondents' exhibit HB-57, Ex. 5 (R. p. 850a) that "The Miller feeder, which was commercialized in 1919 and is a rival and alleged infringer of the Peiler inventions with about 150 of them installed, has a productive capacity of about 840 million articles annually."

The conclusion seems inescapable, therefore, that the article was knowingly and intentionally misrepresented to the Primary Examiner and to the Board of Appeals not only as being Clarke's unbiased views, but also as relating only to the commercial success of Peiler's particular machine as disclosed in his pending application and one other machine invented by Peiler.

Nearly six years elapsed after the article was filed in the Patent Office before other events, relevant to the conduct of these respondents with respect to it, occurred. These subsequent events cast their light backwardly on the activities of the parties during the time of preparation and filing of the Clarke article, giving

added illumination with regard to the purposes, understandings, and intentions of respondents at that time.

Almost immediately after May 5, 1932, when the opinion of the Third Circuit Court of Appeals was entered in the Hartford vs. Hazel-Atlas case, 59 F. (2d) 399, in which the Court quoted from and emphasized the "Clarke article" and reversed the decree of the district court by deciding in favor of Hartford, all of the respondents except Dorsey renewed their interest in Clarke and later showed curious and deep concern for his financial welfare.

After the decision in that case, both parties to the suit hastened to contact Clarke for the purpose of obtaining from him an affidavit regarding the circumstances surrounding the preparation of the article—Hartford through Hatch and J. E. Naylor, the latter of whom also represented Owens, and Hazel-Atlas through an investigator named John S. McCarthy.

75 Clarke had retained the original signed manuscript of the article. Hatch testified that during a conference between himself, Brown, and W. J. Belknap, the latter of whom was general counsel for Hartford, Belknap expressed fear that "possibly somebody might get to Clarke and make him a cash offer and Clarke might deny the whole business, deny his signature and everything else" (R. p. 568a). Hatch admitted that he had been advised that someone was investigating the circumstances surrounding the article (D. Ex. B, p. 87, R. pp. 561-2a). Brown testified that Belknap wanted a copy of the article with Clarke's signature and an affidavit that Clarke sponsored the article "in case anybody should ever raise the question about whether it was Mr. Clarke's article or not" (R. p. 399a).

Accordingly, within five days (on May 10, 1932) after the Third Circuit Court of Appeals' decision, Hatch visited Clarke in Toledo and gave him a copy of it and explained that, due to the decision, the article had assumed great importance. At the same time he requested a photostatic copy of the signed manuscript of the article. Hatch's request was not then granted on the ground that the manuscript could not be found.

It appears from the record that Hazel-Atlas had become interested in the article. That company, naturally, was interested in the authenticity of the article on which the court had relied in deciding against it. Consequently, it caused its investigator, McCarthy, to visit Clarke in Toledo three days after Hatch's visit. McCarthy, too, requested a photostatic copy of the signed manuscript and also permission to inspect Clarke's files. Both requests were denied.

These refusals by Clarke were not accepted as final by either Hartford or Hazel-Atlas. Both companies persisted in their

efforts. Hartford sent Naylor to Clarke, both of whom were in Toledo, for the purpose of obtaining a photostatic copy of the signed manuscript, but in vain. He so informed Hatch by letter dated May 16, 1932 (D. Ex. B, p. 42; R. p. 557a), reading in part as follows:

76 "This was a complete change in front from what I had experienced on the occasions of my two other visits with Mr. Clarke, and I suggested that I would immediately have you call him. For some reason or other, Clarke has had a change of heart about the whole situation, and I believe it would be well to follow the matter closely to determine just what the difficulty seems to be. I shall, however, do nothing further until I hear from you."

Meantime, Clarke had informed Hatch of McCarthy's visit.

Replying to Naylor's letter under date of May 20, 1932 (D. Ex. B, p. 45), Hatch said in part:

"I feel a great deal of sympathy for Mr. Clarke. None of us had any idea that this article would ever gain such prominence. I think it highly desirable for whoever of your organization is most intimate with Mr. Clarke to keep in contact with him, so that he can feel that he has our support. The last conversation I had with Mr. Clarke over the telephone seemed to indicate that he was not offended in any way. It is true, nevertheless, that we have caused him more or less annoyance.

"I do not know any reason why Mr. Clarke should furnish Hazel-Atlas with a photostat copy of this article unless he wishes to do so. From our point of view, we would like to have a photostat of the signed article in case we need it, but we have so much confidence in Mr. Clarke that I do not feel like urging him. I hope you will have a chance to talk to Mr. Carter before it is necessary for you to see Mr. Clarke again. It might be a good idea, however, to let him know Maloney's attitude. Confidentially, I think Maloney feels quite pleased. He says that Hazel-Atlas have never done anything for him, which I guess is true. Maloney said that he knew the entire article was true, but he would not say even that to McCarthy."

On the same day (May 16, 1932) that Naylor advised Hatch that Clarke had undergone a "change of heart," Hatch wrote (Ex.

HB-40, R. P. 854a) Clarke in part as follows:

77 "They are trying to make a mountain out of a molehill, and I am so firmly convinced of the absolute honesty of all of our acts that it would give me great pleasure to collaborate with you again if there should ever be another opportunity.

"If we can make sure that nothing but the truth comes out in this matter, none of us has anything to fear.

"Again, if I have put anything in this memorandum that is not strictly in accordance with what you told me, please do not be offended. It was written five days after I saw you, and it was in accordance with my recollection at that time.

"We all appreciate the firm stand which you have taken in this matter."

The memorandum referred to in that letter is dated February 26, 1927 (Ex. HB-25, R. p. 823a), and was a narration by Hatch of his interview with Clarke concerning what Clarke said about a visit of a Mr. William R. Wood with Clarke, during which visit the article was discussed. For present purposes, the only pertinent part of the memorandum reads as follows:

"After getting this information Mr. Clarke told Mr. Wood the whole history of this article, i. e., that I furnished at least some of the information and that I assisted him in preparing the article. I do not know the exact extent to which Mr. Clarke ascribed the article to me."

Clarke testified that he was wholly unable to explain this last letter addressed to him by Hatch; he did not know what there was to fear or what firm stand he had taken.

Hatch followed up his letter by another visit to Clarke on May 24. McCarthy also visited Clarke on the same day, but not at the same time as Hatch. Both desired an affidavit from Clarke telling how the article was prepared. Clarke replied to McCarthy that he would not "stultify" himself by signing an affidavit.

Nevertheless, according to the testimony, he gave one to Hatch (Ex. HB-41, R. p. 860a) together with a photostatic copy of the signed manuscript of the article.

Feeling elated at his success in obtaining a photostatic copy of the signed manuscript and an affidavit from Clarke, Hatch lost no time in advising Carter of his success by letter dated May 24 or 25, 1932 (D. Ex. B, p. 47), as follows:

"Am sending copy to Belknap. Just told McNerney of very successful results.

"You assisted me greatly."

A more complete report was made by Hatch to Carter under date of May 28, 1932 (D. Ex. B, p. 47; R. p. 558a), as follows:

"Your information on my visit to Toledo has been rather brief, I imagine, and I thought you might like to have a little more detailed report.

"I want to state most emphatically that Mr. Clarke has fully lived up to the statement I made about him, to the effect that he was absolutely honest and trustworthy in every respect. He has been of great assistance to us, and I believe that we are in a most satisfactory position. It does not seem wise to distribute copies of all of the papers I have, or to go into much detail in correspond-

ence, but as you know, everything that I have is at your service if you need it.

"The assistance which you gave me the morning I arrived in Toledo was very useful, and I had to call on Mr. Naylor several times afterward. His assistance, like your own, was quite necessary.

"We are quite indebted to Mr. Clarke. While it is true that he has done nothing beyond what would be expected of any reputable man, nevertheless, without violating any confidence or doing anything of a questionable nature, he might easily have caused us a lot of trouble. This should not be forgotten, and I would like to have a general statement to this effect brought to the personal attention of Mr. Lewis. (sic Levis).

"I have a lot of interesting things to tell you the next time I have a chance to talk to you."

79 Although characterized by a lack of frankness, Hatch's testimony on cross-examination before this Committee indicates what trouble Clarke could have caused Hartford, as follows (R. p. 560a):

"Q. Well, in what way could Mr. Clarke 'easily have caused us a lot of trouble'?

"A. Well, he could have balled things up a whole lot by making implications or statements which were not wholly in accordance with the truth, and which I said—remember, I was the man that knew him—I said he would never do those things, and I didn't think he could have.

"Q. What did you have in mind he could have done at which you were relieved that he didn't do?

"A. He might have told Mr. McCarthy that he never signed the article.

"Q. And he might also have told McCarthy that you wrote it and he didn't, might he not?

"A. Let us see—didn't I just read here some place where I said that I didn't know whether Clarke—I didn't know why Clarke should furnish Hazel-Atlas with photostats unless he wanted to? Does that sound—

"Q. I don't think that has anything to do with it. Do you mean to say your company was greatly indebted to Mr. Clarke merely because he produced a signed copy of the article that exhibited his signature to it?

"A. No, at that time I had more in mind than that. He believed that the Clarke article was of considerable importance in the decision from Philadelphia. Whether that is so or not, I don't know.

"Q. And he could have caused you great trouble by telling your connection with that article, couldn't he?

"A. He had already told that.

"Q. To Mr. McCarthy?

"A. Not to McCarthy, as I know of."

During the two weeks Hartford and Hazel-Atlas were endeavoring to obtain from Clarke a photostatic copy of the signed manuscript of the article and his affidavit, it does not appear that he made any demand on either company for money, but there is testimony that he did so some two months later.

80 According to the testimony, Hatch again met Clarke in Toledo on July 22, 1932, by previous appointment, at which meeting Clarke narrated to Hatch a series of financial misfortunes which he said had befallen him and he demanded of Hatch \$10,000 from Hartford (R. p. 499a). Hatch reported this demand by telephone to Brown, and on the same day Brown directed Hatch by telegram not to make any definite commitments until after hearing from or talking with Carter and with other Owens officials (R. p. 500a; Ex. HB-49, R. p. 882a) Hatch complied with this direction.

Upon returning to Hartford, Hatch discussed Clarke's demand further with Brown. Hatch states that he reported to Brown "that both Mr. Carter and I felt that we would be justified in hiring Mr. Clarke on some retainer basis because we have never paid him anything for various services which he had performed for the Hartford-Empire Company, because of Mr. Clarke's work in connection with the 'Clarke Article', although not paid for or agreed to be paid for, had nevertheless taken up a considerable amount of Mr. Clarke's time". Brown agreed, but directed Hatch to "See if I couldn't beat him down some" (R. p. 501a).

Thereupon Hatch met Clarke in New York City the following August 4, and handed him \$500, which was charged on Hartford's books as travelling expenses (R. p. 541a). Meeting again in Pittsburgh on August 10 (R. pp. 224a, 234a), Hatch handed Clarke \$7,500, which he referred to as "a nice little present for you" (R. pp. 225a, 235a). This "present" was charged on Hartford's books as an attorney's fee. Both payments were made in cash. Consequently, it appears that Clarke's demand for \$10,000, made in Toledo on July 22, 1932, was "beaten down" to \$8,000, which was fully completed twenty days later by the \$7,500 paid in Pittsburgh. On August 11, 1932, Clarke was induced to sign what is euphemistically called a retainer agreement (D. Ex. B, p. 207; Ex. HB-54, R. p. 884; R. p. 965a) in which it was recited that "for and in consideration of a retainer for five (5) years paid said Clarke
81 by said Hartford-Empire Company, the receipt whereof is hereby acknowledged, said Clarke" agrees to render certain services and was to be paid therefor \$25 per day for any services which he might be requested to render during that period

of time. Clarke testified that he did not see this suddenly effected "retainer agreement" and did not know anything about it until after he had been paid the \$8,000, but he signed it. One-half of this amount was paid by Owens.

Respondents Brown and Hatch were not in agreement with Clarke about the purpose of this payment. Neither of them testified that it was strictly a retainer as specified in the agreement. Hatch said that it was for past services and for the "sympathy" Hartford had for Clarke. The only services he could recall that Clarke had rendered Hartford during past years was the "Clarke article," compiling data, making investigations and reports, and preparing to testify regarding the same. He was unable to say how much of the \$8,000 was allocated to the corporate sympathy Hartford had for Clarke or how much should be allocated for services rendered, although he had recommended the payment. Also, he could not satisfactorily explain why it was necessary to "beat Clarke down" if the payment was a gratuity.

Brown testified that a part of the money was for sympathy, a part for past services, and a part for future services. Upon being asked if Hartford employees were treated the same way, he replied that Hartford made loans to its employees for which repayment was expected. He could not recall, however, any loan equaling the sum paid to Clarke, or any sum over \$2,500.

Clarke, on the other hand, testified that there never was any obligation on the part of Hartford to pay him anything; that the entire \$8,000 was a gift, and that he so reported it on his income tax return.

It was generally denied by Brown, Hatch and Clarke that the payment was "hush money."

82 There is no convincing evidence in the case to warrant our finding that Hartford, as a corporation, had any sympathy whatever for what turned out to be Clarke's temporary financial embarrassment, and, consequently, we do not believe that the payment to Clarke was a gift. We think, and it was admitted by counsel for Brown and Hatch at the final hearing before this Committee, that the "retainer agreement" is a sham insofar as the cash payment of \$8,000 is concerned. We, furthermore, think that such payment was for the purpose of removing Belknap's fear that "somebody might get to Clarke and make him a cash offer" (R. p. 568a) and that he would talk.

Various explanations are offered by respondents as justifying their conduct. Dorsey contended that it is customary to file affidavits in applications for patents, and that if he had filed an affidavit by Clarke in Peiler's application, such affidavit reciting only the alleged facts narrated in the article, no criticism could attach to him and, therefore, he should be subjected to less or no criticism

because of the unobjectionable nature of the article per se. Dorsey conveniently neglects to say that he did not merely file the article; he also misrepresented and misused it.

Brown also testified that the first time the idea occurred to him that it would be desirable to file a copy of the article in the Patent Office was shortly before its date of publication; that he thought it would be useful for the information and education of the Examiner; that what he had in mind when he addressed the letter of December 11, 1925 (Ex. C-70-1, R. p. 743a) to Carter was something along the line of Peiler's affidavit, which was filed in the Patent Office simultaneously with the copy of the article; that such affidavit was the result of the suggestion made by Carter (Ex. C-70-2, R. p. 744a) in his reply to the letter mentioned; and that at the offstart both he and Hatch thought the article would be useful for its publicity value.

This brings us to an evaluation of the testimony.

83 It is not necessary for the purpose of the recommendation hereinafter made to find that these respondents schemed or connived to procure Clarke's signature to Hatch's article and that they intended to subsequently file it in Peiler's application. The record is conclusive that they did procure such signature and so filed it, and all of them had full knowledge before it was filed in such application that it was to be filed therein. Nevertheless, we make such finding.

We observe that the matter before us would have had a radically different aspect if, when the Clarke article was filed in the Patent Office, it had not been misrepresented as relating only to the commercial success of the specific invention disclosed in Peiler's pending application, and if it had been accompanied by a statement to the effect that the preparation of the article had been instigated by Hartford and that the notation thereon of Mr. Clarke's name as author and its publication in National Glass Budget had been procured by Hartford. Since such misrepresentations were made and no such information was given to the Patent Office at that time, or at any other time while the Peiler application was pending in the Office, we will not concern ourselves with what effect such procedure would have had on the matter before us now. The fact remains that it was entitled in and filed in the Peiler application and employed for the very purpose Brown originally set out to accomplish, i. e., for the purpose of "describing the revolution produced in the glass business by the plunger gob feeding system" disclosed by Peiler in his pending application (Ex. C-70-1, R. p. 743a); and Carter understood, before the article was filed, that it was designed to influence the Examiner "to a more favorable consideration of

Hartford's broad claims" (R. pp. 603a, 618a, 620a; Ex. C-70-7, R. p. 763a; D. Ex. B, p. 41).

84 The explanation that the article was originally desired by Brown and Hatch solely for publicity purposes does not appear to be borne out by the record by the article itself. It does not advertise Hartford any more than the other companies mentioned therein. In his letter (D. Ex. B, p. 159) transmitting the manuscript of the article to Editor Kimes, Hatch said: "You will understand that we do not want to have any unnecessary connection with this article as it is presented wholly as the statement and opinion of Mr. Clarke." And in his letter dated March 30, 1926 (D. Ex. H) to Carter, he said "we want some one not associated in any way with either of our companies" to sign the article.

Additionally, it was argued that the Office was not misled by the article. As to this we observe that the article was capable of being used to mislead and, as employed, was liable to mislead, and in our opinion the record shows how a deliberate attempt was made to so employ it, as pointed out hereinbefore. Peiler's patented file does not disclose what consideration, if any, the Board of Appeals gave to the article. It may and could have influenced the Board's judgment because that tribunal did not follow the Examiner's rejections. But, however this may be, we are not concerned now with the question whether success was attained by the article and the use made of it in influencing the judgment of the Office in the grant of a patent on the Peiler application; we are concerned with the purpose and intent the respondents had in mind in preparing and having it printed in a trade journal over Clarke's signature and thereafterwards filing it in that application.

All of the respondents repeatedly contended that the article composed by Hatch was in fact Clarke's; that Clarke became the author of the article by signing it after making certain corrections therein. Also, it was pointed out that it is customary for public officials, including members of this Committee, to sign papers prepared for their signatures and to forward them through various channels to their destinations. The latter statement may be substantially correct, but the same situation did not prevail concerning Clarke. In our view, to represent Clarke
85 as being the true author of the article was a misrepresentation and deceptive.

In his letter dated May 27, 1926 (Ex. HB-3, R. p. 765a), to McNerney, Clarke said that Hatch had furnished him with a prepared article for his sponsorship. He testified before this Committee that he did not write a single sentence of the article; he admits that he did not prepare the production curves (R. p.

253a), and we find that (the corrections made by him in the text are immaterial and for the most part trivial (see R. p. 705a), as he himself recognized them to be. In his telegram to Hatch of July 7, 1926 (Ex. HB-10, R. p. 778a), he frankly stated that he would sponsor the "article with very slight alteration and modifications".

There is little similarity between a public officer signing a paper prepared at his direction and the action of these respondents in filing the spurious article in this Office. It is one thing for a public official to cause a paper to be prepared by an assistant for his signature, for use in the discharge of his official duty, and it is an entirely different thing for an officer of a corporation, who is prosecuting a claim against the Government, to procure the signature of a prominent and presumptively disinterested officer of a labor union to an article prepared by an employee of the corporation, for publication in a trade journal and subsequent filing in a governmental bureau, with the intention of misrepresenting the contents of the article and of misleading such bureau as to its true origin and authorship, in the hope that it would induce favorable action on the corporation's claim.

The difference lies in the intent coupled with the manner of use of the two instruments and not in their origins. In the first case, there is no intention to mislead, and deception is not possible. Quite the contrary, the signature fixes responsibility and is required by law or custom. In the second case, deception is intended, and it is calculated to be successful not only

86 because of the weight which may be given to the experience, standing, abilities, apparent disinterestedness and lack of prejudice of the purported author of the article, but also because of the consideration which may be given to the presumptively authoritative journal in which the article appeared and of the misrepresentations concerning it.

As justification for filing the article, it was asserted that the facts narrated therein were true. Peiler testified that as a history of glass feeders it is incomplete and does not distinguish properly between the different types of feeders, and Hatch admitted that it is incomplete (R. p. 515a). Assuming, however, that the article is true, it is clear that the intent was that the name subscribed to the article and the publication in which it appeared should conceal the true origin and source of the article and its actual authorship.

This raises the question, what harm was done in filing the article, regardless of its source and of who signed it?

The role that the article was designed to play was minimized by Brown (R. p. 955a) and by a principal witness for him and

Hatch. This witness qualified himself as an expert in Patent Office procedure, mainly because of his many years of service in the Patent Office, and he, like Brown, testified that the article could not have deceived the Office because it did not refer to the formal claims being prosecuted in the Peiler application at the time the article was filed therein. This testimony itself is misleading and fogs the record.

It frequently happens in the examination of an application for patent that the claimed invention disclosed in the application encroaches upon the disclosures of prior patented inventions or printed publications so closely that the Examiner or the Board of Appeals, as the case may be, is in doubt as to its patentable novelty despite the differences recited in such claims and, hence, whether the claimed invention adds anything to the sum of human knowledge. In such circumstances, the examining officer is required to consider any showing of the commercial success of the claimed invention as described in the specification forming a part of the application for patent, not, however, for the purpose of creating a doubt as to patentable novelty, but of resolving any such doubt which may exist in favor of the applicant (In re Thompson, 26 App. D. C., 419, 120 O. G. 2756; Standard Brands, Inc. v. Federal Yeast Corp., 38 F. (2d) 329; Ex parte Crosley, Jr., 1928 C. D., 45, 377 O. G. 505).

It is not customary for a showing of this kind to include a discussion of the formal claims in the application, and if the claims are discussed, the discussion is contained in a paper separate from such showing. The reason for this is that when the prosecution of an application has reached this stage, the Office has recognized the fact that at least some of the formal claims presented recite something which distinguishes from the prior art. Further argument as to how the invention covered by such claims differs from such art would be superfluous or additive. For that reason, such a showing almost invariably relates, and should always relate, to the invention as disclosed in the application as a whole and discusses the commercial success of the invention as disclosed in its relation to similar prior art devices and mechanisms. The object of such a showing is to tip the balance in favor of patentability; and we are of the opinion that the so-called Clarke article was filed principally for that purpose. As hereinbefore discussed at considerable length, it appears to us from the record before us here that counsel unquestionably falsely employed the article in the Patent Office with the view of making it appear to the Examiner and to the Board of Appeals that only Peiler's specific invention, which employs a plunger, had attained such outstanding commercial successes as to "revolutionize the art." That was Brown's original object (Ex. C-70-1,

R. p. 743a), and Carter so understood it (Ex. C-70-7, R. p. 763a).

88 It is our opinion that to argue the failure of the article to mention the formal claims in the Peiler application is to obscure not only the truth as to its real purpose, but the only purpose it could have subserved in the circumstances.

In connection with the use made of the article, we observe that perfect judgment is the ideal toward which the Office strives in determining rights to patents. While oftentimes it may fall far short of that ideal, yet it can hope to prevent actions destructive of it. By reason of the nature of an application for patent, the relationship of attorneys to the Patent Office requires the highest degree of candor and good faith. In its relation to applicants, the Office does not occupy the position of a party litigant; it must rely upon their integrity and deal with them in a spirit of trust and confidence; and, as a quasi-judicial tribunal, it acts in a sovereign capacity to grant them valuable property rights when these are once established.

It is a high duty and privilege to ascertain and define such rights—a duty which entails heavy responsibilities and devolves upon the attorneys as well as upon the Office, although in different degrees. When such duty is discharged fully and intelligently, by the accurate appraisal and securing to inventors the fruits of their discoveries, there inevitably results a boon to mankind by the advancement of the sciences and useful arts. On the other hand, when such duty is discharged incorrectly, by the grant of an invalid patent, there tends to result a brake on industrial progress to the detriment of all the people.

In many instances in the determination of rights to patents reliance must be placed to a large extent in the ex parte statements and affidavits of the applicants themselves and those privy to them. Familiar examples are the averments required in the oath forming a part of every original application regarding prior inventorship, lack of knowledge and belief on the part of the applicant of prior knowledge or use of the invention; public use or sale of the invention in the United States; and prior publication of the invention. An applicant who intentionally

89 makes a false oath regarding such matters is guilty of fraud, and any patent granted in view of misrepresentations in these matters may be cancelled. A representation of equal importance relates to the commercial success of an invention.

The true facts relating to the superior usefulness and commercial success of an applicant's invention, as evidenced by its acceptance by the trade, are peculiarly within the knowledge of the owner of the application; and, in a case where the resolution by the Office of the question of the allowability of an application hangs on such a fragile thread as the manner in which the claimed in-

vention has been received by the public, it clearly becomes the duty of such owner and those who represent him to fully disclose all of the material and relevant facts and circumstances involved, and to conceal and misstate nothing. To do less would be inimical to the public interest because of the likelihood of inducing the grant of an invalid patent by chicanery and thereby to place in the hands of the patent owner the means to impose upon the public by false pretenses and with threats to others of expensive and ruinous litigation.

As is clear from what has been stated in this report, it is our carefully considered opinion that the record made before us indubitably and conclusively shows and establishes that the respondents and each of them has been guilty of gross misconduct toward the Patent Office in connection with the so-called Clarke article, the most salient points of said misconduct being: First, the preparation and the presentation of the article to the Patent Office in such manner as to induce the Patent Office officials to believe that the article compared the commercial success of the specific invention of the Peiler application with the commercial success of the Owens machines, whereas, in truth, the comparison was of the commercial success of gob/feeding machines in general—of which there were several types other than Peiler's—with the commercial

success of the Owens machines; and, Secondly, the deliberate concealment from the Patent Office of the facts that (a)

the so-called Clarke article was prepared by and on behalf of Hartford; (b) that the sponsorship of the article by Clarke and the notation thereon of Clarke's name as author was procured by and on behalf of Hartford, and (c) that the publication of the article in the National Glass Budget was procured by Hartford and on its behalf through Hatch. We hold and believe that in the perpetration of such concealment all of the respondents deliberately collaborated not only with each other but also directly or indirectly with Clarke, and that all of the respondents connived with each other with the intention of misleading and deceiving the officials of the Patent Office as to the true state of the said material facts concerning the connection of Hartford with the preparation and publishing of the article with Clarke's name appearing thereon as the author thereof, when in fact he was not the true author thereof, and all this for the purpose of securing favorable action by the Patent Office with respect to the claims in the Peiler application.

It is our understanding that our recommendation is desired as to what disciplinary action, if any, the Committee deems fitting, proper, and just under all the facts and circumstances to mete out to the several respondents. Consequently, we shall do so.

In view of the foregoing, your Committee is of the opinion that the conduct and actions of those respondents in the respects discussed are abhorrent to dealings requiring candor and intellectual honesty, and that they should be disciplined. Having in mind that none of them is a newcomer in the patent field and that they, with deliberateness and skill, schemed to impose on the Office and to interfere with the proper administration of the patent laws, your Committee, with the exceptions of Messrs. Van Arsdale and Shaffer, recommends that, by reason of their gross misconduct alleged and proved, all of the respondents be disbarred from further practice before the Patent Office. Messrs. Van Arsdale and 91 Shaffer feel that the penalty recommended is too severe in view of the following facts and circumstances, which your Committee have also considered, to wit:

1. So far as it appears from the record, no one of the respondents has ever been guilty of or charged with improper conduct other than the conduct which forms the basis of the charges here under review.

2. The actions and lack of action here involved took place in 1925 and 1926, that is, nineteen or twenty years ago.

3. The respondents have been publicly castigated in the published decisions of the U. S. Supreme Court, Circuit Court of Appeals and the District Court.

4. We are informed that the respondents are under investigation by one or more Bar Associations with regard to this matter and that the question of their disbarment from Federal practice is before the Circuit Court of Appeals of the Third Circuit.

5. At least since August 25, 1942, the date of Judge Kloeb's opinion in the District Court case, respondents have been under opprobrium, particularly among their fellow members of the bar, in consequence of their acts and of said opinion.

6. Further, as stated by Mr. Jo. Bailly Brown at final argument, respondents have been subjected to unfavorable publicity in the press.

Messrs. Van Arsdale and Shaffer, therefore, recommend that in view of all of the factors outlined above, including the castigation of respondents by the opinions of the courts, the Bar Associations, and the press, respondents be not disbarred perpetually from practice before the Patent Office but that instead 92 respondents and each of them be suspended from practice for a definite period of time, for instance, up to one year.

Respectfully submitted.

(S) Henry Van Arsdale,

HENRY VAN ARSDALE,

Chairman, Assistant Commissioner.

(S) Conder C. Henry,
CONDER C. HENRY,
Assistant Commissioner.

(S) W. W. Cochran,
WILLIAM W. COCHRAN,
Solicitor.

(S) Charles H. Shaffer,
CHARLES H. SHAFFER,
Member of the Board of Appeals.

(S) Mark Taylor,
MARK TAYLOR,
Member of the Board of Appeals.

(S) J. A. Brearley,
JAMES A. BREARLEY,
Chief Clerk.

(S) C. W. Moore,
CLARENCE W. MOORE,
Law Examiner.

APR. 26, 1945.

93 Filed May 10, 1947. Charles E. Stewart, Clerk.

In the District Court of the United States
for the District of Columbia

Civil No. 29528

VERNON M. DORSEY, PLAINTIFF

v.

CASPER W. OOMS, DEFENDANT

Notice of Appeal

Notice is hereby given this 10th day of May 1947, that Vernon M. Dorsey hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 12th day of February, 1947, in favor of Defendant against said Plaintiff.

WILLIAM E. LEAHY,
Attorney for Petitioner,
821 15th St. NW.

Copy c/o E. L. Reynolds, Esq., Patent Office, Wash., D. C.

94 In United States Court of Appeals for the District of
Columbia Circuit

United States Court of Appeals for the District of Columbia
Circuit. Filed Jan. 26, 1949. Joseph W. Stewart, Clerk.

No. 9572

VERNON M. DORSEY, APPELLANT

v.

LAWRENCE C. KINGSLAND, COMMISSIONER OF PATENTS, APPELLEE

Appeal from the District Court of the United States for the Dis-
trict of Columbia (now the United States District Court for
the District of Columbia)

Argued January 22, 1948.—Decided January 26, 1949

Mr. William E. Leahy, with whom Mr. James F. Reilly was on
the brief, for appellant.

Mr. Jo. Baily Brown, Special Assistant to the Secretary of
Commerce, with whom Mr. E. L. Reynolds was on the brief, for
appellee.

Before EDGERTON, CLARK, and WILBUR K. MILLER, JJ.

Opinion

CLARK, J.: This is an appeal from a denial by the District Court
of the petition of Vernon M. Dorsey to annul an order of the
Patent Office which disbarred appellant from practice before the
Patent Office on grounds of gross misconduct. Such facts as are
material to the decision in this case are set forth below and are,
therefore, not rehearsed at this point.

To the majority of this court the whole record of this case bears
indelible evidence that the conduct of the Patent Office in the whole
proceeding carried out nearly two decades after the alleged com-
mission of the offense amounts to a classic exemplification of a
citizen being deprived of a valuable right (as well as honor and
a means of livelihood) without due process of law or indeed with-
out process of law of any kind except bureaucratic "lynch law."

The appellant, Vernon M. Dorsey, now nearly eighty years old,
has been an honored and respected member of the Bar of the
Patent Office since 1890, and of this court since its inception. It
is conceded on all hands that his whole record during all of this
time, both before and since 1926 (the date of the alleged commis-
sion of the offense for which he was convicted) has been exemplary

95. and without a blemish. Both the lapse of time between the alleged commission of the offense and the trial and also the exemplary conduct of the appellant both before and since the alleged offense become extremely important under the doctrine of this court expressed in *In re Adriaans*,¹ where both considerations were given major weight.

This case is so nearly a "bay-horse" case² that it deserves to be specially considered at this stage of the proceedings. The following quotations from the opinion of this court in that case show clearly the nature of that case and make perfectly apparent at a glance its direct application to the instant case. The case has never been overruled or modified.

In that case in speaking for the court, Justice McComas said in part: "The disbarment of Adriaans for *misconduct* which happened about twelve years before is most unusual. The majority of the justices of the supreme court [now the District Court] who concurred in the order of disbarment appear to appreciate this, for they say that under ordinary circumstances the lapse of time would cause the court to seriously consider the long delay in filing the charges. *The record discloses* no extraordinary circumstance which persuaded the court to ignore this long delay. The court do say that, if Adriaans were guilty of the specific offense charged to have been committed twelve years before, *he* has not offered proof of any amendment of his conduct since. *We are more impressed by the absence from the record of charges of misconduct since.* Here this charge stands alone."³

Here this court clearly held that the burden was on the proponents of disbarment to show subsequent misconduct and that failing that, in the absence of extraordinary circumstances, the lapse of twelve years would go far to cure the specific offense alleged. The similarity of the two cases is striking except that in the Adriaans case the lapse was twelve years, in the instant case more than eighteen.

And at page 522, this court said: "The disbarment of an attorney is a serious punishment. The right to exercise his profession should not be lightly taken from an attorney. When the court determines to disbar an unworthy member of an honorable profession it ought to require the *clearest legal proof*."

And again at page 523, the court said: "After twelve years we must be careful not to assume what the evidence failed to prove."

¹ 28 App. D. C. 515 (1907).

² An expression commonly in use in some jurisdictions to indicate that the case cited and the case being decided are so identical that not only is the ownership of a horse involved in each but that both horses were bay horses.

³ 28 App. D. C. at page 519.

The very point which has been the fatal defect in the theory of appellee from the beginning and continued throughout this argument is here pointed out in this old case with unerring finger by this very court.

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And the court concluded: "The charge of misconduct upon the specification of misconduct whereon the court passed the order appealed from is not supported by the proof. *We naturally hesitate to review the finding of the court below, but we are convinced that the evidence here is not legally sufficient to justify the disbarment of this respondent.* Though we are disinclined to interfere with the order of the supreme court of this District in a case of this character, we are unable to resist the conclusion that these equity proceedings, after twelve years' delay to make this charge, as a ground for disbarment of this attorney, are not such *clear and definite proof of the misconduct alleged as to justify us in affirming this order.* * * * The power to disbar ought always to be exercised with great caution and only in clear cases. No criminal proceedings on this account were commenced against this respondent, and after this long delay we cannot agree with the court [below] that the matters disclosed by this record suffice to sustain this order. *This is not a criminal proceeding, but such a charge should be supported by a preponderance of satisfactory evidence. The case should be clear and free from doubt.* The career of an unworthy member of the bar is apt to reveal misconduct more recent than in this case, where the proof is legally insufficient to disbar this respondent on account of an offense alleged to have been committed about twelve years ago."¹

The order of disbarment was therefore reversed outright.

[The italics throughout the quotations from this opinion are supplied.]

In this proceeding instituted nearly twenty years after the transaction complained of, the Patent Office makes the pitiful admission of incapacity that a great and responsible agency of the Government could be unduly influenced and controlled in the adjudication of valuable rights confided to its jurisdiction by the mere introduction of an article in a trade journal. It is no reflection on the integrity of trade papers which serve a useful and valuable purpose in our commercial life to say that they are certainly not authoritative scientific treatises or to state the fact known of all men, that insertion of articles in their columns may sometimes be influenced by the wishes of good and lucrative advertisers. It was the duty of the Patent Office under the law to

¹ 28 App. D. C. at pages 524-5.

investigate these matters for itself, to arrive at a determination on the facts and evidence presented and not to shift the burden of its own responsibilities to a blind reliance on some article presented from some trade journal, which with ordinary intelligence it might have known to be self-serving for the party offering it.

97 Contrary to this salutary rule, the Patent Office in a desperate effort to alibi its confessed failure to perform its duty waited more than eighteen years until the evidence had largely disappeared to bring stale charges against appellant, and then proceeded to try and convict him before a "kangaroo court." We use the term "kangaroo court" advisedly because this so-called tribunal tried appellant on charges most of which were not even included in the notice to show cause and on which there is not a shred of evidence to connect him, convicted him on several of these charges and deprived a venerable man and respected lawyer of his means of livelihood. For a lawyer to be disbarred is the equivalent of a soldier receiving a dishonorable discharge on the field of battle. He is deprived of not only a valuable right but of honor as well and an irremovable aspersion is cast upon his character as long as the judgment stands.

The only justification assigned for disbarring appellant on a proceeding which included trial on many charges of which he had not been apprised and had not been afforded an opportunity to prepare his defense and as to which the evidence did not even remotely connect him, was that as a witness in his own behalf he did not assume the burden of proof and affirmatively disprove the allegations against him (of many of which he had not been notified) and that on some questions his memory was faulty in that he sometimes responded that he could not remember. *Mirabile dictu!*

We have known many lawyers in our time. We cannot recall any who have been in active practice, many of whom are many years younger than appellant, who would be prepared when called upon, under the pain of being arbitrarily deprived of his livelihood and his honor, to testify as to all the incidents of a case which had been tried eighteen to twenty years before or as to the considerations which had led him to tender evidence or to fail to tender evidence. To say that a man approaching eighty should be disbarred because he could not remember some incident of a trial which took place twenty years before seems to me to be absurd.

The majority of this court are of the opinion that the learned trial court takes altogether too narrow a view of its own jurisdiction. It proceeds upon the theory that the case is one for the

strict and extreme application of the doctrine of "administrative finality",⁵ which might better be known as "administrative infallibility." But whatever may be one's opinion of this doctrine, it has no possible application to this case. The action of the Commissioner here complained of in disbarring Dorsey was not an administrative act. It was a quasi-judicial act. The whole theory of administrative finality stems from the assumption that the administrative agency is composed of "experts"—in many instances a most erroneous assumption. But conceding that the personnel of the Patent Office may be experts in their administrative function of determining patent and copy-right claims, the horrendous hash made of the record in this case shows clearly that they are by no means experts in a quasi-judicial proceeding wherein they went to the utmost extreme in their zeal to deprive a citizen of a valuable and precious right without due process of law.

Under Section 8 of the Patent Act of 1861, it was provided that the Commissioner of Patents for gross misconduct, "may refuse to recognize any person as a patent agent either generally or in any particular case; *but the reasons of the Commissioner for such refusal shall be duly recorded, and subject to the approval of the President of the United States.*"⁶ [Italics supplied.]

This amounted to a declaration by the Congress that matters of disbarment and disqualification arising in the Patent Office should be handled and disposed of subject to the approval of the President in the administrative process.

By the Act of 1870, reenacted in 1874, it was no longer necessary to obtain the approval of the President but the approval of the Secretary of the Interior (in whose Department the Patent Office was then located) for that of the Chief Executive. Here again the Congress showed its intention of having these matters disposed of under the administrative process.

Even under this state of the law, this court held in *Garfield v. Spaulding*,⁷ that the court had power to set aside a disbarment order when there is denial of due process of law.

The rule, however, was stated in *Wedderburn v. Bliss*.⁸ In that case *Wedderburn* was found guilty by the Commissioner and the decision was affirmed by the Secretary without the latter having taken the trouble to hear argument on behalf of *Wedderburn*. *Wedderburn* applied for mandamus to compel the Secretary to

⁵ For further clarifying discussion of the doctrine of administrative finality, see the opinion of Judge (now Chief Judge) Stephens of this court in *Philadelphia Co. v. Securities & Exchange Commission*, 82 U. S. App. D. C. 335, 164 F. 2d 889 (1947), cert. denied, 333 U. S. 828 (1948), wherein (164 F. 2d at pages 897-8) a careful analysis is made of those portions of the opinion of the Supreme Court in *Rochester Telephone Corporation v. United States*, 307 U. S. 125, 59 Sup. Ct. 754, 83 L. Ed. 1147 (1939), which deal with that doctrine.

⁶ 12 Stat. 247 (1861).

⁷ 32 App. D. C. 153 (1908).

⁸ 12 App. D. C. 485 (1898).

grant him a hearing before affirming the order of the Commissioner. The District Court denied mandamus and this court affirmed this action saying, (p. 492): "The question in the case is, whether the appellant had in the Department of the Interior the *hearing upon his case to which he was by law entitled*. For, as to the character of the judgment to be rendered upon such 99 hearing, there is, of course, no pretence that it can be controlled or directed in any manner by the courts of law, or that it is *subject to review by any other tribunal for any supposed error*."

"The final determination upon such hearing is for the Secretary of the Interior, and not a matter for the consideration of the courts." [Italics supplied.] But by 1922, a change had come o'er the spirit of the congressional dream. Recognizing correctly that the deprivation of a valuable right of a citizen was one which involved due process of law and therefore was a matter *for judicial rather than administrative examination*, the Congress in passing a bill sponsored by the Bar Association deliberately took the whole matter out of the administrative process and subjected it to the judicial process. It dispensed with the approval and review of the Secretary of the Interior (now replaced by the Secretary of Commerce) and instead imposed the right and duty upon the District Court at the instance of an aggrieved party to conduct a "review" of the case. *Here* was that mandate for a judicial review for the lack of which this court had decided against Wedderburn as we have noted *supra*. And *where* under the language of this statute does the doctrine of "administrative finality" have any place in the case?

That statute which gives jurisdiction to the District Court follows: "The Commissioner of Patents may, after notice and opportunity for a hearing, suspend or exclude, either generally or in any particular case, from further practice before his office any person, agent, or attorney shown to be incompetent or disreputable, or guilty of gross misconduct, or who refuses to comply with the said rules and regulations, or who shall, with intent to defraud in any manner, deceive, mislead, or threaten any applicant or prospective applicant, or other person having immediate or prospective business before the office, by word, circular, letter, or by advertising. The reasons for any such suspension or exclusion shall be duly recorded. *The action of the commissioner may be reviewed upon the petition of the person so refused recognition or so suspended or excluded by the District Court of the United States for the District of Columbia under such conditions and upon such proceeding as the said court may by its rules determine.*" [Italics ours.]

* U. S. C. § 41 (1946), based upon 42 Stat. 390-1 (1922).

It seems to us that the *review* contemplated was a full judicial review just exactly like that of any other case where judicial review is provided. By that act, Congress changed the whole matter of disbarment from any administrative proceeding to a quasi-judicial one, which in truth it was. The District Court had full and original jurisdiction for a complete review just as this court has and has always exercised in the matter of 100 appeals from disbarment from the District Court. It is believed that there has not been a single case in this court where this court has failed to reexamine the entire record in a disbarment proceeding and to examine the case de novo to insure the fullest opportunity to the accused lawyer to protect his honor and preserve his means of livelihood. A typical and most persuasive case is the *Adriaans* case, quoted *supra*. It seems to us that the District Court should be permitted to do no less to insure due process of law in reviewing cases of disbarment from the Patent Office than this court does in reviewing proceedings of disbarment from the District Court.

An illuminating note on the degree of quantum of proof necessary to justify disbarment or suspension of an attorney is to be found in 105 A. L. R. 984 following the case of *Re Mayberry*, Massachusetts Supreme Judicial Court, July 9, 1936, 3 N. E. 2d 248. From the cases cited in this note it appears that while a few jurisdictions require only a preponderance of the evidence, or a "fair preponderance", a larger number require a "clear preponderance", and a still larger number of respectable authorities require "clear and satisfactory proof," "clear and convincing proof" or "proof clear and free from doubt." A few cases have held that where crime or grave malpractice is alleged the proof must be "beyond a reasonable doubt."

To be sure, at the time of the enactment of Section 11 in 1922, the doctrine of "administrative finality" (or administrative infallibility) had never been heard of. But by 1946 this theory was thoroughly familiar to lawyers and Congress proceeded to legislate upon it, among other things, by passing the Administrative Procedure Act of 1946, 5 U. S. C. § 1001 (1946). Under Section 10 (e) of the Administrative Procedure Act, it became the right, and indeed the duty, of the court upon proper application of an aggrieved party to judicially review the action of any agency, and it may review the whole record of the proceedings had below for the purpose of ascertaining any prejudicial error. Under these provisions the burden of proof must be upon the proponent of the rule to show cause.

The whole legislative history of the Administrative Procedure Act and more particularly the luminous discussion on the floor of the Senate between three of the leading lawyers of the Senate,

Senators George, McCarran, and Ferguson, conclusively show that it was the inflexible intention of Congress to (in the language of Chairman McCarran of the Senate Judiciary Committee): "establish a guide for administrative groups so that they would apply the rule in such a way that there would be *substantial probative evidence* behind their findings, and so that they could say, 'We are not afraid to have our findings reviewed by a court' * * * We are saying that there must be 101 probative evidence of a substantive nature, and that even though the commission or bureau may take hearsay evidence in its hearings, it *must have some probative evidence to sustain its finding.*" [Italics supplied.]

In this discussion it was repeatedly agreed between Senators McCarran, George, and Ferguson, all eminent former jurists, that the Act was intended to change and did change the construction put upon various acts of Congress by some courts that *any* evidence would be sufficient to sustain the verdict or judgment of an administrative agency and to substitute therefor the doctrine that *substantial probative* evidence must be required.

In view of these statutes and their history, it seems to us that the trial court by the extremely narrow view of its own jurisdiction, limiting it in effect to the "administrative finality" and "abuse of discretion" doctrines, has denied the appellant the protection of the statutes mentioned and in effect permitted him to be deprived of a valuable right without due process.

It is our opinion that appellant was disbarred by the then Commissioner without *substantial probative* evidence on any of the five points in which he was found guilty and without any evidence at all on some of them. Some of the allegations on which the Committee found Dorsey guilty were so puerile they should have been summarily stricken by the Commissioner and, failing that, by the trial court.

The so-called Board (spoken of in appellee's brief as sacrosanct) especially disclaimed any controlling influence from the decision of the Supreme Court in *Hazel Atlas Glass Co. v. Hartford Empire Co.*, 322 U. S. 238, 64 S. Ct. 997, or by the decisions of the Third Circuit Court of appeals. This disclaimer was obviously necessary because Dorsey was not a party to any of these suits, had no opportunity to appear and defend himself and is in no sense bound by them. Even the able Special Counsel could not escape this necessity as witness his strident disclaimer (App. Br. 33). Even he had to admit that there was nothing in these opinions to establish individual guilt on the part of Dorsey.

Without, at this stage of the proceedings, attempting to go into all the details of the record in this case, we will briefly recapitulate the salient points.

In 1926 there was pending in the Patent Office an application for a patent by a man named Peiler, whose assignee was the Hartford Empire Company of Hartford, Connecticut. More than eighteen years after, to wit, in late 1944, a notice to show cause why he should not be disbarred from practice before the Patent Office was served upon appellant Dorsey who was a resident practitioner before the Patent Office, of which bar he had been an honored member for fifty-four years. At approximately 102 the same time identical notices to show cause were served on three other respondents. They were: (1) Robson D. Brown of Hartford, Conn., who had charge of the Patent Department of the Hartford-Empire Co., assignee of the Peiler patent application, (2) Roswell F. Hatch of Hartford, Conn., who was employed by Hartford as a contact man between his employers' engineers and the Patent Office, (3) Henry W. Carter of Toledo, Ohio, an officer of the Owens Bottle Company, which was a licensee of the Hartford-Empire Co., and therefore a party in interest on the Peiler application under which they were a licensee from the assignee.

It is to be particularly observed that while the language of the notices to show cause was identical, they were not *jointly noticed* nor was any allegation of conspiracy set out in any of the notices. When the cases were heard before the so-called committee appointed by the appellee (or his predecessor twice removed) the four cases, as the appellee contends, were consolidated. Just how that was accomplished is left in considerable doubt. Under the circumstances it could only be done by consent and stipulation. We have been unable to find any such consent or stipulation in the record. Both parties have brushed it lightly aside in their briefs. Appellant in his brief (page 3) says: "The hearings as to all of the respondents were consolidated, *it being understood* at the hearing that the committee had four separate cases before it but only one record." [Italics supplied.] Appellee in his brief is even more vague. He says (pages 1 and 2 of appellee's brief): "In the proceeding below the appellant and Roswell F. Hatch, Henry W. Carter, and Robson D. Brown were individually served with identical rules to show cause why they should not be disbarred for gross misconduct. They filed separate answers to those rules. They appeared before the Committee on Enrollment and Disbarment of the Patent Office together [they necessarily appeared together since they had been separately noticed to appear at the same time] and by agreement of all concerned a joint record was made." The result was simply a record of mob procedure.

Appellee has cautiously refrained from any reference to the record to bear out this sweeping statement, and a painstaking examination of the record has failed to reveal to this court either

the specific terms of any such stipulation or the purport thereof although it is vitally necessary to the jurisdiction of the committee and the Commissioner.

Certainly it seems inconceivable to the majority of this court that a lawyer of the admitted experience and ability of appellant would deliberately and voluntarily have verbally agreed to waive his rights and consent to be tried without notice on charges
103 on which he had *not* been put on notice, of some of which he had never even heard, and convicted and deprived of his rights on charges of participating in events of which he had never even heard until the introduction of evidence before this alleged tribunal involving some of the other respondents to this shot-gun joindure but without the remotest scintilla of evidence of knowledge or participation against appellant himself. On such procedure as this, according to the special counsel for appellee, the appellant is to be deprived of his hard-won and long and respectably held position at the Bar. As a matter of fact, special counsel has repeatedly relied upon his own inferences based on the virulence and malevolence which has been manifest in the pursuit of Dorsey throughout these proceedings to piece out irremediable gaps in the chain of necessary "substantial probative" evidence. Special counsel is an able and experienced lawyer and should know full well that his own imaginings cannot supply the lack of this vitally necessary substantial probative evidence and that vituperation cannot take the place of facts.

The committee apparently found Dorsey guilty on five counts although both the charges and the findings are so confused that it is difficult to determine just what any of the defendants were charged with or convicted of. The charge as to Dorsey's participation in the preparation of an article for filing in the Patent Office is the first. The record shows, and Justice Morris found, that Dorsey's connection with the preparation of the article consisted in a slight verbal correction of a draft which had been sent him. Justice Morris found that these corrections probably amounted to a change of only two words. And this was the whole amount of Dorsey's participation in the preparation of the article.

The record shows that sometime late in 1925 there was some discussion between Dorsey and Brown as to the desirability of an affidavit or article which could be inserted in the file in the Peiler application supporting patentability. It was agreed that a suitable person to prepare the article would be Mr. Henry W. Carter, an officer of the Owens Glass Company, a licensee under the patents controlled by Hartford. The desired evidence was supplied by Peiler himself who wrote an exhaustive article involving the history and development of the glass makers' art. This was reduced

to affidavit form and filed as an exhibit in the case. This affidavit embodied everything that Dorsey had hoped to prove.

In January 1926, Dorsey went to Europe and did not return until sometime in April of that year. Upon his return he found a draft of an article which had been prepared by Hatch and which Hatch stated it was his intention to submit to one Maloney, who

104 Hatch stated was president of the Bottle Blowers, with the request that Maloney look it over, correct or rewrite it in any way he saw fit and sign it. Maloney, as it later appeared, declined to sign this, not because he disagreed with any of the contents, but because he did not wish to offend any of Hartford's competitors. Dorsey made some slight minor correction (found by Justice Morris, the trial judge, probably not to exceed two words) and returned it to Hatch. It later transpired in the somewhat confused and bemired record, that it had been Hatch's original intention to have Carter sponsor the article. This it later appeared Carter had been unwilling to do because his connection with and knowledge of the glass-making art and the changes in it were too recent to justify his writing or sponsoring a historical article on the subject. Hatch then turned to Maloney, who, declined on the grounds above stated.

Up to this time there is no suggestion and no evidence that Dorsey had the slightest knowledge of the Hatch manuscript prior to his examining it and returning it to Hatch and it does not appear that he had any knowledge that Dorsey knew that Hatch intended it for use in the Patent Office. Dorsey testified that the article submitted by Hatch did not interest him because it was not of the same nature as that which Dorsey and Hatch had discussed. (This need had been supplied by the Peiler affidavit.) Dorsey contended that he had no knowledge that Hatch intended the article to be used in the Patent Office and that at the time he made the minor correction of two words he had no intention of filing it in the Patent Office.

Dorsey later remembered the manuscript and wrote Hatch for a copy of it. Hatch replied by sending a copy and in a letter accompanying it stated that he had submitted the article to Clarke, president of the American Flint Glass Workers' Union, and that Clarke stated he would consider revising it and publishing it over his own signature. Hatch stated to Dorsey that he had had to defend the truth of his article. As a result, Hatch wrote that Clarke had agreed to "rewrite the article to a considerable extent, I suspect, and publish it in the trade journal."

The article was subsequently filed in the Patent Office by Dorsey who signed a letter prepared by Brown, the head of the Patent Department of Hartford. This letter did not inform the Patent

Office that the article had been prepared at the instance of Hartford. The Patent Office found Dorsey guilty because he had presented the Clark article to the Patent Office by falsely representing Clarke to be the author. But the District Court drew a differentiation as follows:

"The critical point is that it was material in the consideration of such article to know that it has been substantially prepared and published by those interested in securing the allowance of the broad claims of Peiler."

105 No such critical point is to be found in the specification of the rule to show cause, nor can it be construed as broad enough to cover it. Manifestly a party cannot be found guilty and subjected to a severe penalty upon charges of the nature of which he is not even apprised.

In the case of *Czarra v. Board of Medical Supervisors*,¹⁰ this court said: "It is not conceivable that any man can be held to answer a charge so grave in its character and so far-reaching in its influence upon his standing and reputation as a physician, and yet so vague and indefinite as this."¹¹

This court quoted with approval the statement of the court in *People use of State Board of Health v. McCoy*, 125 Ill. 295, 17 N. E. 786, to the effect that: "The right of the citizen to practice his profession for which he has expended time and money to qualify himself is too important to be taken away from him without some reasonable cause."¹²

And in the same case this court also cited with approval the case of *State ex rel Baldwin v. Kellogg*, 14 Mont. 426, 36 Pac. 957, wherein it is said: "But it cannot for one moment be doubted that the complaint must set forth facts which constitute an offense.

* * * If the judgment is against him, he is deprived of the right to practice his profession, to which perhaps he has devoted a life of learning and labor. In a situation of this gravity, a defendant has the right, within the spirit of the constitution, 'to demand the nature and cause of the accusation'; that is to say, a defendant must be notified of what he is charged, and must be charged with something."¹³

Moreover, we do not believe that Dorsey was guilty of any dereliction of his duty as a member of the Patent Bar by his failure to make known the exact contribution of several people to the preparation of the article, even if he had known it. The test should have been the truth or falsity of the facts set out in the article and we do not understand that the truth of these statements has been called into question in any quarter.

¹⁰ 24 App. D. C. 251 (1904).

¹¹ Id. at page 257.

¹² 17 N. E. at page 787.

¹³ 36 Pac. at pages 958-9.

An attorney who had occasion to quote from Washington's Farewell Address would be guilty of no breach of faith if he failed to mention the fact that it is generally believed that a considerable part of the actual penmanship was done by Alexander Hamilton. One who quotes from Andrew Jackson's majestic Nullification Proclamation is not to be criticized for fraud if he fails to set out the fact that while written from Jackson's notes the stately diction is actually the result of the penmanship of Edward Livingston. It is generally known that most

106 Presidents and candidates for President employ assistants who not only engage themselves in preparing data and making suggestions for the speeches and state papers of their chiefs but frequently participate extensively in the actual draftsmanship. Yet seldom, if ever, in the delivery of the speech is attention called to the portions actually written by the deliverer and the portions supplied by the assistants. It is not wholly unknown that the judges of even the highest courts have law clerks and that these law clerks are engaged not only in research but frequently make most valuable suggestions as to the preparation of opinions and not infrequently participate largely in the actual draftsmanship of the opinion. Yet when these opinions are handed down no specific mention is called to the paragraphs actually written by the judge rendering the opinion and those written by the law clerk or those inserted as a result of the suggestions of other judges who may or may not have sat in the case.

The next two charges on which appellant was convicted are identical except as to the tribunal. One is that Dorsey misled or attempted to mislead the Patent Office as to the inferences and conclusions to be drawn from the Clarke article. The next is identical except that in that it is charged that Dorsey misled or attempted to mislead the Third Circuit Court of Appeals as to the import of the Clarke article.

The latter was too much for the stomach of appellee's special counsel and he tacitly abandons it in his brief (appellee's brief p. 32). Yet appellant was tried and convicted upon this charge and so far as anything in the record shows this count may have been the moving consideration in administering the extreme penalty of disbarment. So far as we have been able to learn this count is a case of first instance in the judicial annals of this country. So far as we have been able to find never before in the history of the country has a subordinate committee of a mere bureau of the government had the arrogance to assume to set itself up as the protector of the dignity and intelligence of a United States Court of Appeals.

It seems not untimely to remark that if counsel were to be disbarred if they made an inference or drew a conclusion as to the

import of any evidence which happened to be at variance with the view of the same evidence held by opposing counsel or by the court, the bar of every tribunal in the country from the Supreme Court down to the Patent Office would soon be decimated.

The trial court did not find that Dorsey was guilty of misrepresenting the contents of the Clarke article and in our opinion erred when it did not reverse the Commissioner for finding Dorsey guilty on this count.

107 We come now to the last charge, the charge involving the payment of \$8,000.00 to Clarke by Hartford some six years after the publication of the article. The committee and the Commissioner seem to have put great emphasis upon this transaction in arriving at the punishment of disbarment. But neither the committee nor the Commissioner nor any one else can find in the record one scintilla of evidence connecting Dorsey in any way directly or indirectly with the payment to Clarke or with having the slightest knowledge or intimation of it until it was brought out in open court in Toledo in 1941. While the committee's findings lay great stress upon this point in arriving at the maximum penalty, appellee in his brief attempts to limp away from it. He says (p. 321): "There is no evidence in the record that Dorsey participated in the arrangement for those payments or even knew of them at the time they were made. Consequently, we have never made any point against Dorsey because of the payments per se." Then appellee somewhat lamely tries to sidle out of this admission by the somewhat boastful assertion that if it had been necessary he could have tied Dorsey into this transaction "*through the conspiracy rule.*" Appellee's eminent special counsel apparently overlooked the admitted fact that no conspiracy was alleged and that appellant and no one else was tried on that charge. The amount of attention paid to this finding by the committee and the Commissioner, with which Dorsey was not even remotely connected, indicate that the whole finding should be reversed outright.

Appellee strongly contends that the statutory remedy of appeal from a proceeding of disbarment ends with the District Court. In other words, he conceives of the subjection under the statute to judicial process as a very short, one-way street which comes up against a dead wall with the decision of the District Court. We see no merit whatever in this view.

Under the Securities Exchange Act of 1934, apparently exclusive jurisdiction is vested in the appropriate Court of Appeals to review the findings of the Commission. Nothing is said explicitly in the statute as to further appeal to the Supreme Court. Yet the Supreme Court frequently does entertain petitions for certiorari and sometimes reverses the action of the Courts of Appeal.

The same situation exists with the Federal Trade Commission Act, the Perishable Agricultural Commodities Act, the Agricultural Adjustment Act, and other statutes too numerous to mention. In all of these instances appeals are regularly taken to the Supreme Court, despite the fact that no specific language in the statute authorizes appeals beyond this court. The reason is, of course, that once a transaction, be it administrative or judicial, is committed to the judicial process as distinguished from
108 the administrative, appeals follow as a matter of course through regular judicial channels.

We believe also that as a matter of law the judgment of disbarment is excessive. We shall not labor or argue this point in view of the fact that we hold the view that the proceedings in this case are so clearly and unescapably wrong that the judgment appealed from should be reversed outright as was done in the *Adrians* case.

Reversed.

Dissenting Opinion.

EDGERTON, J., dissenting: I agree with the opinion of Judge Morris in the District Court. *Hatch v. Ooms, Dorsey v. Ooms*, 69 F. Supp. 788.

The term disbarment, though convenient, is not exact. The orders of the Patent Office and the District Court do not forbid appellant to hold himself out as a lawyer, advise clients, and appear in courts. They exclude him from practice before the Patent Office.

It is immaterial that appellant did not write the so-called Clarke article and that the article did not contain false statements. It contained statements of opinion. Appellant represented it to the Patent Office as the disinterested work of Clarke. This representation was false and appellant knew it was false. This false representation was highly material. As appellant himself says, "It was Clarke's name that gave [the article] its status." As the Supreme Court has said, the article "should have stood or fallen under the only title it could honestly have been given—that of a brief in behalf of Hartford, prepared by Hartford's agents, attorneys, and collaborators." *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U. S. 238, 247.

The record of the present proceedings in the Patent Office contains the following affidavit, which the appellant executed in 1941: "Sometime in the spring or early summer of 1926, Mr. Roswell F. Hatch of the Hartford-Empire Company furnished me with a copy of a manuscript for an article entitled 'Introduction of Automatic Glass Working Machinery; How Received by Organized Labor', which was later published in the *National Glass Budget* for July 17, 1926, under the signature of William P.

Clarke. I read the said manuscript and made some slight suggestions as to its verbiage. * * * At my request, a copy of the National Glass Budget containing the said article, authenticated by an affidavit of the publisher, was obtained and filed in the record of the above-identified Peiler application."

On May 20, 1926, Hatch wrote to the appellant: "I fear I may have to go out to Toledo again to get Clarke to show some speed in this matter and perhaps to supervise what he publishes.

109 I think he understood just what we want published, but he might unintentionally destroy some of the propaganda which we planned. I will see that you get a copy of some Journal in which this article appears when it comes out. * * *

In the present proceedings in the Patent Office appellant admitted he had represented the article to the Office as the disinterested work of Clarke.

I think the proceedings were properly conducted. I think appellant's fraud was fairly charged, proved, and found. I think the proof conclusive and the result just. The public and social interests in discouraging the fraudulent procurement of patents seem to me to outweigh appellant's interest in his reputation and practice. However, that question is not before us. Where no error of law is involved, we have no authority to substitute our opinions for those of the Patent Office and the District Court. If the evidence of fraud, which I think conclusive, was so much as substantial, we must uphold their action, unless we are prepared to rule as a matter of law either that fraud in procuring a patent is too trivial to be "gross misconduct" or that success in concealing fraud for many years creates a prescriptive right to exemption from its consequences.

In United States Court of Appeals for the District of
Columbia Circuit

United States Court of Appeals for the District of Columbia
Circuit. Filed Jan. 26, 1949. Joseph W. Stewart, Clerk.

January Term, 1949—No. 9572

VERNON M. DORSEY, APPELLANT

vs.

LAWRENCE C. KINGSLAND, COMMISSIONER OF PATENTS, APPELLEE

Appeal from the District Court of the United States for the Dis-
trict of Columbia (now United States District Court for the
District of Columbia)

Before EDGEKTON, CLARK, and WILBUR K. MILLER, JJ.

Judgment

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Columbia, now United States District Court for the District of Columbia, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court
 110 appealed from in this cause be, and the same is hereby, reversed, and that this cause be, and it is hereby, remanded to the said District Court for further proceedings not inconsistent with the opinion of this Court.

Per Circuit Judge CLARK.

Dated January 26, 1949.

Dissenting opinion by Circuit Judge Edgerton.

In the United States Court of Appeals for the District of
 Columbia Circuit

- United States Court of Appeals for the District of Columbia
 Circuit. Filed Mar. 24, 1949. Joseph W. Stewart, Clerk.

No. 9572

VERNON M. DORSEY, APPELLANT

v.

LAWRENCE C. KINGSLAND, COMMISSIONER OF PATENTS, APPELLEE

Designation of record

The Clerk will please prepare a certified transcript of record for use on petition for writ of certiorari to the Supreme Court of the United States in the above-entitled cause, and include therein the following:

1. Joint Appendix to Appellant's Brief.
2. Excerpts from the testimony before the Patent Office's Committee on Enrollment and Disbarment contained in Addenda to Appellant's Brief.
3. Opinion.
4. Judgment.
5. This Designation.
6. Clerk's certificate.

Philip B. Perlman,
 PHILIP P. PERLMAN,
Solicitor General,
Counsel for Appellee.
 WILLIAM E. LEAHY,
Counsel for Appellant.

MARCH 18, 1949.

United States Court of Appeals for the District of Columbia
Circuit

I, Joseph W. Stewart, Clerk of the United States Court of Appeals for the District of Columbia Circuit, formerly
111 United States Court of Appeals for the District of Columbia, hereby certify that the foregoing pages numbered 1 to 155, both inclusive, constitute a true copy of the joint appendix to the briefs of the parties, and the proceedings of the said Court of Appeals as designated by counsel in the case of: Vernon M. Dorsey, Appellant, v. Lawrence C. Kingsland, Commissioner of Patents, Appellee, No. 9572, — January Term, 1949 —, as the same remain upon the files and records of said Court of Appeals. In testimony whereof, I hereunto subscribe my name and affix the seal of said Court of Appeals, at the city of Washington, this twenty-fifth day of March A. D. 1949.

[SEAL]

JOSEPH W. STEWART,
*Clerk of the United States Court of Appeals
for the District of Columbia Circuit.*

In the Supreme Court of the United States

October Term, 1948

No. —

LAWRENCE C. KINGSLAND, COMMISSIONER OF PATENTS, PETITIONER
v.

VERNON M. DORSEY, RESPONDENT

Stipulation

Subject to this Court's approval, it is hereby stipulated and agreed by and between counsel for the respective parties hereto that, for the purpose of the petition for a writ of certiorari, the printed record may consist of the following:

1. Joint Appendix to Appellant's Brief.
2. Excerpts from the testimony before the Patent Office's Committee on Enrollment and Disbarment contained in Addenda to Appellant's Brief, omitting the introductory statement.
3. Proceedings had before the United States Court of Appeals for the District of Columbia Circuit.

It is further stipulated and agreed that petitioner will cause the Clerk of the United States Court of Appeals for the District of Columbia Circuit to file with the Clerk of the Supreme Court a complete certified transcript of the record on appeal in the United States Court of Appeals for the District of Columbia

Circuit; and that, in the event that the petition for writ of certiorari is granted, the printed record shall consist of the proceedings in the court below and such portions of the complete transcript of record on appeal in that court as the parties may designate.

112 It is further stipulated and agreed that either of the parties hereto may refer in its brief to the record filed in the Supreme Court of the United States, including any part thereof which has not been printed.

Philip B. Perlman,
 PHILIP P. PERLMAN,
Solicitor General,
Counsel for Petitioner.
 WILLIAM E. LEAHY,
Counsel for Respondent.

MARCH 18, 1949.

113 Supreme Court of the United States

○ No. 53, October Term, 1948

LAWRENCE C. KINGSLAND, COMMISSIONER OF PATENTS, PETITIONER

vs.

VERNON M. DORSEY

Order allowing certiorari

Filed May 31, 1949

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

114 In The Supreme Court of the United States

Stipulation as to printing record

Filed Aug. 22, 1949

Subject to this Court's approval, it is hereby stipulated and agreed by and between counsel for the respective parties hereto that, for the purpose of the hearing on the merits, the printed record may consist of the following:

1. Joint appendix to appellant's brief.
2. Proceedings had before the United States Court of Appeals for the District of Columbia Circuit.

3. The following excerpts from the testimony before the Patent Office's Committee on Enrollment and Disbarment:

(a) Page 2a, commencing with "The Chairman: I think", to and including "suffice to read just one."

(b) Page 3a, commencing with "(The order to show cause", to and including all of page 4a.

(c) Page 7a, commencing with "Opening Statement" to and including page 8a, concluding with "55 U. S. Patents Quarterly, 14."

(d) Page 8a, commencing with "Mr. Brown: And the next is the case", to and including "64 Supreme Court 1015."

(e) Page 10a, commencing with "Mr. Brown: I don't know how thoroughly", to and including all of page 19a.

(f) Page 21a, commencing with "The Chairman: We want", to and including "should be admitted."

115 (g) Page 22a, commencing with "Mr. Wood: I don't know whether", to and including page 25a, concluding with "(R. 4126, Exs. 1157-1159)."

(h) Page 25a, commencing with "Beyond the findings of fact", to and including page 26a, concluding with "what you are going in to."

(i) Page 28a, commencing with "Mr. Brown: The charges are stated", to and including page 36a, concluding with "and present their case."

(j) Page 37a, commencing with "Mr. Brown: I am now through", to and including page 38a, concluding with the words, "I shall be prepared to answer."

(k) Page 51a, commencing with "Opening Statement", to and including page 52a, concluding with "the Clarke article, all of it."

(l) Page 60a, commencing with "The Chairman: Shall we go ahead", to and including page 61a, concluding "Mr. Parham to examine him."

(m) Page 78a, commencing with "Q. Mr. Clarke, I show you", to and including page 82a, concluding with "Mr. Dorsey: Perfectly."

(n) Page 311a, commencing with "Karl E. Peiler, called as witness" to and including "Direct Examination."

(o) Page 314a, commencing with "By Mr. Goodrich", to and including page 316a, concluding with "October 12, 1926."

(p) Page 324a, commencing with "Did Mr. Brown consult", to and including page 325a, concluding with "in connection with the pending application."

(q) Page 335a, commencing with "Robson D. Brown", to and including "Direct Examination."

(r) Page 347a, commencing with "Q. Going back to 1925-1926", to and including page 348a, concluding with "A. No."

(s) Page 349a, commencing with "Q. Now, Colonel Brown, I show you", to and including page 351a, concluding with "decisions on these claims."

116 (t) Page 352a, commencing with "Q. Now, Colonel Brown, was that article", to and including page 354a, concluding with "that it was coming out."

(u) Page 358a, commencing with "Q. Will you tell the committee—", to and including "of which there were several."

(v) Page 367a, commencing with "Q. At the time you filed", to and including "of the file wrapper as printed."

(w) Page 371a, commencing with "That is signed 'Karl E. Peiler * * *'", to and including "No, I had no such feeling."

(x) Page 374a, commencing with "Q. I will ask you", to and including page 376a, concluding with "and was not being so put forward."

(y) Page 377a, commencing with "Q. Let us get on", to and including "asked the Board to hear him."

(z) Page 385a, commencing with "Q. Who were counsel", to and including page 387a, concluding with "to my affidavit as Exhibit 5."

(aa) Page 395a, commencing with "Q. Did you during this correspondence", to and including "Mr. Dorsey were consulted."

(bb) Page 404a, commencing with "Q. Was there ever any attempt", to and including "so why should we hush it?"

(cc) Page 415a, "Cross Examination."

(dd) Page 418a, commencing with "Q. And after it was published", to and including page 419a, concluding with "It depended on what was in it."

(ee) Page 429a, commencing with "Q. Well, let us get back", to and including page 430a, concluding with "it would be a good thing to put in."

(ff) Page 447a, commencing with "Q. And is it not a fact", to and including "A. In that litigation, yes."

(gg) Page 453a, commencing with "Q. Mr. Brown, during the years 1925", to and including page 454a, concluding with "quite often during that period."

117 (hh) Page 455a, commencing with "Q. Coming back to 1925", to and including page 457a, concluding with "go abroad until 1932."

(ii) Page 461a, commencing with "Q. When that was done", to and including page 462a, concluding with "I don't think I was."

(jj) Page 465a, commencing with "Q. And what if anything did Mr. Carter have to do with the preparation", to and including "and I did that."

(kk) Page 465a, commencing with "The Chairman: Mr. Dorsey", to and including "I have no questions."

(ll) Page 469a, commencing with "Roswell F. Hatch", to and including "Direct Examination."

(mm) Page 484a, commencing with "Q. You had, I believe", to and including "Maloney and Clarke."

(nn) Page 485a, commencing with "Q. Did you get any help", to and including "two words he put in."

(oo) Page 510a, "Cross Examination."

(pp) Page 512a, commencing with "Did I understand", to and including page 513a concluding with "wrote it? A. Yes, sir."

(qq) Page 526a, commencing with "Q. Is it your position", to and including "decide that for yourself."

(rr) Page 544a, commencing with "Q. Well, now we have talked", to and including page 547a, concluding with "A. No."

(ss) Page 566a, commencing with "By Mr. Dorsey", to and including "Mr. Dorsey: That is all."

(tt) Page 597a, commencing with "Henry W. Carter", to and including "testified as follows."

(uu) Page 617a, "Cross Examination."

(vv) Page 622a, commencing with "Q. I will ask you", to and including "in connection with the Patent Office."

(ww) Page 622a, commencing with "Q. Mr. Carter, I don't want", to and including page 624a, concluding with "in late December 1925."

118 (xx) Page 648a, commencing with "Vernon M. Dorsey", to and including all of page 649a.

(yy) Page 652a, commencing with "Vernon M. Dorsey" to and including page 679a, concluding with "That is all."

(zz) Exhibit D-72, commencing with page 932a, to and including page 941a.

(aaa) Exhibit D-72-A, commencing with page 886a, to and including 888a.

(bbb) Exhibit D-72-B, commencing with page 889a, to and including 890a.

(ccc) Exhibit D-72-C, commencing with page 759a, to and including page 761a.

(ddd) Exhibit HB-61, commencing with page 815a, to and including 821a.

(eee) Exhibit C-70-4, commencing with page 754a, to and including page 755a.

(fff) Extract from Exhibit 57 (Affidavit of Robson D. Brown), commencing with page 954a at top, to and including page 957a, concluding with "displaced by automatic machinery."

(ggg) Extracts from Exhibit 67 (Physical), commencing with page 3099 reading "Q. Who besides Mr. Carter", to and including page 3100, concluding with "Mr. Dorsey's name before", and

page 3111, commencing with "Q. Now, you testified before", to and including "He did, yes sir."

It is further stipulated and agreed that either of the parties hereto may refer in its brief to the record filed in the Supreme Court of the United States, including any part thereof which has not been printed.

Philip B. Perlman,
 PHILIP B. PERLMAN,
Solicitor General,
Counsel for Petitioner.
 William E. Leahy,
 WILLIAM E. LEAHY,
Counsel for Respondent.

119 [File endorsement omitted.]

1a Before The Committee on Enrollment and
 Disbarment

UNITED STATES PATENT OFFICE

IN THE MATTERS OF: ROBSON D. BROWN, RESPONDENT, ROSWELL F.
 HATCH, RESPONDENT, VERNON M. DORSEY, RESPONDENT, AND
 HENRY W. CARTER, RESPONDENT

ROOM 1035, COMMERCE BUILDING,
 WASHINGTON, D. C.

Tuesday, November 21, 1944.

The above-entitled matters came on for hearing, pursuant to notice, at 10:00 a. m.

Before: Assistant Commissioner HENRY VAN ARSDALE (Chairman), Assistant Commissioner CONDER C. HENRY, Solicitor W. W. COCHRAN, Examiner-in-Chief CHARLES H. SHAFFER, Examiner-in-Chief MARK TAYLOR, Chief Clerk JAMES A. BREARLEY, Law Examiner CLARENCE W. MOORE.

Appearances: Edgar J. Goodrich, Esq., Albert C. Hirsch, Esq., and Sidney F. Parham, Esq., on behalf of the respondents
 2a Brown and Hatch. Edmund P. Wood, Esq., on behalf of respondent Henry W. Carter. Vernon M. Dorsey, Esq., *pro se*. Jo. Baily Brown, Esq., Special Assistant to the Secretary of Commerce. South Trimble, Jr., Esq., Solicitor, Department of Commerce.

Proceedings

The CHAIRMAN. I think the first thing is to enter the appearances for the stenographer.

Mr. GOODRICH. Albert C. Hirsch of Pittsburgh, Edgar J. Goodrich of Washington, and Sidney F. Parham, appearing for the Respondents Brown and Hatch.

Mr. WOOD. Edmund P. Wood, Cincinnati, appearing for Henry W. Carter.

Mr. DORSEY. V. M. Dorsey, appearing pro se.

Mr. BROWN. South Trimble, Jr., Solicitor of the Department of Commerce, and Jo Baily Brown, Special Assistant to the Secretary of Commerce.

The CHAIRMAN. First, I would like to put on the record the orders to show cause, one addressed to Mr. Vernon M. Dorsey, National Press Building, Washington, D. C.; another to Roswell F. Hatch, P. O. Box 1620, Hartford, Connecticut; the third to Mr. Robson D. Brown, % Hartford Empire Company, P. O. Box 1620, Hartford, Connecticut, and the fourth to Mr. Henry W. Carter, Toledo, Ohio.

As the three are absolutely identical, and the fourth is the same as the first three except as to one date, I think it will suffice to read just one.

3a (The order to show cause referred to is as follows:)

Order to show cause

OCTOBER 11, 1944.

Mr. ROBSON D. BROWN,
% Hartford-Empire Company,
P. O. Box 1620, Hartford, Connecticut.

SIR: Whereas it was found by the Supreme Court of the United States in its decision in the case of Hazel-Atlas Glass Company v. Hartford-Empire Company, 64 S. Ct. 997, that fraud was practiced on the United States Patent Office during the prosecution of the patent application of Karl E. Peiler, No. 294,792, which matured into patent No. 1,655,391 on January 3, 1928, which fraud consisted in the preparation and presentation to the United States Patent Office of an article entitled "Introduction of Automatic Glass Working Machinery; How Received by Organized Labor," naming one William P. Clarke as the author, who in fact was not the author of said article, and

4a Whereas it appears from said decision and the record of the case before the Supreme Court, and the record before the United States Circuit Court of Appeals, Third Circuit, in the case of Hartford-Empire Company v. Hazel-Atlas Glass Company, 137 F. (2d) 764, and the record before the District Court, Northern District of Ohio, West. Div., in the case of United States v. Hartford-Empire Company, 46 F. Supp. 541, and the records of the Patent Office, that you participated in the preparation of said article and/or the presentation thereof to the United States Patent Office during the prosecution of said patent application

knowing that said article was not written by said William P. Clarke, and with the purpose of deceiving the Patent Office as to the authorship of said article and influencing the action of the Patent Office on said application; and that you thereby perpetrated or participated in the perpetration of a fraud on the United States Patent Office.

Now, therefore, you are hereby ordered to show cause on or before November 9, 1944, why, in view of the above, you should not be suspended or excluded from further practice before the United States Patent Office for gross misconduct.

You are hereby notified that a hearing on this order to show cause will be accorded to you before the Committee on Enrollment and Disbarment of the United States Patent Office on November 9, 1944 in Room 1035 of the United States Patent Office in the Department of Commerce, 14th and E Streets NW., Washington, D. C., beginning at 10:00 A. M. on said date.

Conway P. Coe,
CONWAY P. COE,
Commissioner of Patents.

7a *Opening statement on behalf of Department of Commerce*

By Mr. BROWN:

Mr. BROWN. If you please, sir, as I understand this proceeding, it is one instituted by the Patent Office by way of a rule to show cause upon the several Respondents why they should not be disbarred. The Patent Office in issuing that rule, as I believe, felt that a prima facie case had been made out that justified the issuance of the rule. That prima facie case, as I understand it, and as the position of those presenting the case against the Respondents take it to be, is based upon Court decisions in the following cases:

First in Hartford-Empire Company against Hazel-
8a Atlas Glass Company, 39 Fed. (2) 111, in the Western District of Pennsylvania; Hartford-Empire v. Hazel-Atlas, 59 Fed. (2) 399, in the Third Circuit Court of Appeals, which was an appeal of the first-mentioned case.

Those two cases were straight patent infringement suits in the Western District of Pennsylvania.

The third case is United States v. Hartford-Empire Company, et al., an antitrust suit, tried in Ohio, the opinion being reported in 46 Fed. (2) 541; and 55 U. S. Patents Quarterly, 14.

Mr. BROWN. And the next is the case of Hartford-Empire v. Hazel-Atlas Glass Company, and Hartford-Empire v. Shawkee, the two being reported in one decision in 137 Fed. (2) 766. Next,

Hazel-Atlas Glass Company v. Hartford-Empire Company, 322 U. S. 234; 64 Supreme Court 997, and immediately following that the case of Shawkee v. Hartford-Empire, 64 Supreme Court 1015.

10a Mr. BROWN. I don't know how thoroughly or to what extent the Board or members of the Board are familiar with the facts upon which these rules to show cause were based, but I think I should review very briefly the position of the Patent Office, as I understand it, upon which the rules were issued.

In the first Hartford-Empire Hazel-Atlas case, that was a straight patent infringement suit, and on the appeal in the Third Circuit Court of Appeals certain questions as to the so-called Clarke article came into the case because Judge Buffington in that case referred to the so-called Clarke article quite extensively in his opinion, in which he gave a broad construction to the patent in suit. That was a number of years ago.

In the antitrust suit at Toledo, there was introduced evidence on behalf of the Government to the effect that the so-called Clarke article relied upon or referred to extensively by Judge Buffington

11a had been written by one Hatch, and had been published at the instigation and for the benefit of the Hartford-Empire Company and had been filed in the Patent Office as being an article written by William P. Clarke, the president of one of the glass workers' unions.

The question of whether or not that was a fraud on the Patent Office was raised in that case and was considered at length, and the Trial Court made findings, which he filed with his opinion, and which has been before the Patent Office as a basis for the rule to show cause, and as a part of the record for the Patent Office I should like to have read into the record at this stage, findings 155, 156, 157, 158, 159, 160, 162, 163, 164, and 165 of the Trial Court in the case of United States v. Hartford-Empire Company, 46 Fed. Supp. 541.

Mr. GOODRICH. If Your Honors please, we object to that. We have here a new proceeding. I don't need to tell a committee of lawyers that findings of fact and opinions expressed by a Court in a suit to which these people are not parties, a suit brought against the Hartford-Empire Company, a suit which did not involve the question that is before this Board, are not admissible here. We came here to make a record before this committee through testimony of witnesses. We will bring them before you. We have supplied you with their statements in advance so you may be prepared for cross-examination, and they are to be adjudged, as I understand the rules of evidence, on the record made

before you, not on any record or findings of fact or opinion expressed by a Court in an entirely different case.

Those things are not admissible here, as a matter of law or as a matter of fact, as I would like to point out when my turn comes. But as a matter of law, I refer you to the American Insurance

Company v. Lucas in 38 Fed Supp. 936, and to several cases 12a there cited: where it says "statements of facts contained in an opinion cannot be used to ascertain the evidence or the facts, or to control or modify the findings of fact upon which a judgment or order is based."

The only instances where such things as Mr. Brown has presented are admissible, as pointed out in the Eastman Kodak Company case, 295 Fed. 98, arise under Section 2 of the Clayton Act, where it expressly says "a decree may be admitted"—not the findings of fact, not the opinion, but the "decree," and in this very case to which he refers, the District Court for the Western District of Pennsylvania, in this Shawkee-Hartford suit to which Mr. Brown first referred, has decided that question for itself within the last week, following the recognized rule.

In that case the Shawkee Company came in and asked the Court to make findings of fact and opinion based on the opinion of Mr. Justice Black set out in the case to which Mr. Brown refers, saying that the Supreme Court had found—had made findings of fact and expressed an opinion, and asked this Court to adopt them.

Judge Gibson says this:

"The claim for the findings and conclusions is based upon the contention that the Circuit Court of Appeals * * * is but a conduit to convey the findings and conclusions of the Supreme Court to this Court. With this contention this Court cannot agree. * * * This Court, in this suit, knows only the Circuit Court of Appeals, and if facts were found in this action by the Supreme Court, those facts are not in evidence here. This Court knows only its original findings and conclusions, and as those findings were affected by the original mandate of the Circuit Court of Appeals. The request for findings of fact and conclusions of law, as prayed by the defendants must be denied."

13a Which means the Defendants may come in and they have a hearing. I want to make it perfectly clear that we object to any part of any record in any prior law suit or any opinions being regarded as part of the record before this Committee. We are here to make a record with these Respondents in person. You can cross-examine them as much as you please and as long as you wish. As I will try to point out when my

turn comes, this is the first time in the whole history of this glass litigation that the whole story of this Clarke article can be told. It never has been fully told in any of these suits, and the decision of the Supreme Court and the decision of the Third Circuit Court, and the decision of the Court in Ohio were all based on incomplete and truncated records that did not tell the whole story.

These people are here on very serious charges and they are entitled to, and I know you are going to give them, a full and complete hearing. They are bound, of course, by what they said in these records, and that is the only part of any suit by which they are bound and which should be accepted here. I intend, as we go along, to offer parts of the record of these cases, the things these Respondents have said. That is proper for this Committee to have, to see whether there is any contradiction from what they have said before in what they say now. They are entitled to that, but I object to any other part of the record going in.

Mr. WOOD. I have a slightly different objection on behalf of Mr. Carter, and that is this: That the sole issue before the Court in the Toledo case was violation of the Sherman Act; that is, restraint of trade, and all of the testimony in respect of the Clarke article went in for a limited purpose only, and the Judge

received it for the limited purpose only. Mr. Carter testified in that case; he was called by the Government and cross-examined at very great length by Mr. Isseks, counsel for the Government. Mr. Carter at the time was 75 years of age, visibly tired from a long ordeal on the stand. The result was that we did not attempt, in the handling of him, to try to bring out this whole side of the story on cross-examination, because anything involving the ethics that is before this tribunal was not involved there, so that Mr. Carter was not examined in relation to the charges that are here pending, and I don't think it fair to read into the record conclusions of the Court on different legal issues.

Mr. GOODRICH. May I say one thing more, which I had intended to say?

We are speaking of the District Court trial in Ohio. I said the record was incomplete. It was, for the simple reason that the Court would not let the whole story be told. The Court took testimony on the Clarke article for one narrow purpose, namely, whether it had any effect on the negotiations between Hazel, Owens, and Hartford. It had no such effect, as the evidence showed, and it should have been dropped from the case, but it was not.

The point is that the Court would not let us put in evidence as to the truth of the article, nor as to its use in the Patent Office, and here is his ruling:

"I will say to counsel that I am not interested at all in the Clarke article with reference to any influence that it may or may not have had in the Patent Office on the issuing of the patent."

And then he holds counsel to showing only the bearing on the maneuvering that was participated in, or claimed to have been participated in, prior to the contracts between Hartford, Hazel-Atlas, and Owens.

15a The Court ruled further:

"The Court is not interested in going into the truthfulness or untruthfulness of the Clarke article. I am not going into any question pro and con as to truthfulness or untruthfulness of the Clarke article."

In other words, the full story was not told. We want to tell it here. That is what we are here for.

Mr. DORSEY. There is an aspect to this matter that has not been alluded to. That is, findings were made in a case in which the Defendant was the Hartford-Empire Company. I was not a Defendant; I was not a party to the litigation; I was not of counsel. The evidence proper for the Court to consider in making that finding was all the evidence that may have been given by A, B, and C cumulatively bearing on the Hartford Company. The only thing in that record that could possibly bear on me was my own testimony in the case. I had no opportunity or right to cross-examine any witness as to things they may have said about me.

Therefore, I have never had my day in Court, and I object to that language being taken as a prima facie evidence of guilt. It may afford a ground for Your Honor's preferring charges, but then I can answer it de novo, not with that standing against me.

Mr. BROWN. May I say this word in reply? These findings were not offered as adjudications that close the door as against any defense these gentlemen might have, but these findings were made, they were found by a Court, they are not printed in the official report and they have been considered by the Patent Office in its issuing of this rule to show cause, and it seems to me clearly they should be made part of the record. If, as a matter of fact

and as a matter of law, when the proper time comes, these gentlemen can move to strike them out, or they can argue their relevancy or materiality and binding effect, but it would be like an ostrich sticking its head in the sand to ignore the fact that these findings were made.

16a Mr. GOODRICH. That is all right with me. The Patent Office may consider anything it chooses in making its charges. Now, it has made its charges; it has considered whatever it chose, including those findings and records in other cases, maybe numerous

letters, maybe your statements to them and the statements of others.

The Patent Office can bring charges on any reasonable basis, and I assume it felt it had a reasonable basis for the charges, else they would not have been issued. But now the charges are issued, and we are here in response to those charges to try these Respondents, and I insist upon a trial de novo where they can be heard in accordance with the rules of evidence.

Mr. BROWN. I don't think we need to argue the matter at great length. I would like to say just a little bit more about our position. The feeling on this side of the table is that a rule to show cause has been entered, and that the burden is on the Respondents to come in and show why they should not be disbarred. That is the issue that we want to present here, and it might as well be presented now. We think that all these decisions, and the record on which the *Hazel-Atlas v. Hartford-Empire* case was decided in the Supreme Court, are necessarily before you to be considered. These gentlemen are here, and certainly so far as I am concerned, so far as I know, the policy we conceive is this: There will be no objection to their answering them, contravening, disputing them, but the Patent Office cannot ignore the findings of Courts
17a that have been made where substantially the same issues, except the guilt of these particular individuals, were tried and were decided.

I think you are bound to receive those records, subject, of course, to any argument as to materiality, relevancy or binding effect.

Mr. GOODRICH. The burden is on the Respondents. All right. We will take it. We are here for that purpose, to meet that burden. We want to meet it in an orderly, legal way, according to the rules of procedure, and the issues here are not the same, gentlemen, as they were in those cases, as Mr. Brown said. The issues in those cases were against Hartford, the issue at Toledo was whether Hartford was guilty of violation of the Anti-Trust Act and the issue in Philadelphia in the *Hazel* case was whether there was such newly discovered evidence as the Defendants claimed, that the decree entered in 1932 should be reopened on the grounds of newly discovered evidence.

That charge the Third Circuit Court of Appeals, under the circumstances, took as being the equivalent of a charge of fraud on that Court because of the Clarke article to which Judge Buffington referred in his opinion, but the issue was a very narrow issue of procedure, namely whether the Court had the power to reopen its decision entered ten years before, and whether there was newly discovered evidence which would justify such an unusual course.

The Circuit Court took that case to itself and considered it itself, because had there been fraud it would have been on the

Third Circuit Court. Now, it considered that case on its merits and it found for Hartford. While it disapproved of the ghost-writing, it said that article worked no fraud on this Court, and there is no newly discovered evidence here, because the facts
 18a pertaining to the authorship and publication of that article were known to those parties and to this Court in 1932 or before.

That was a decision on the merits by the Third Circuit Court. That decision was reversed by the Supreme Court, again on a truncated record. The story these Respondents must tell you has never been told, and we want to come in and put a clean record before you, make it from the start. I don't care what your charges are based on. You found reasonable grounds to bring them. We are here to answer.

Mr. HENRY. I would like to ask a question. What steps, if any, have been taken on behalf of these gentlemen to overcome the findings of fact made by these Courts?

Mr. GOODRICH. What steps have been taken?

Mr. HENRY. Yes.

Mr. GOODRICH. We are here this morning to take the first steps. There is no place we could go previously. None of these people are parties to the case. In the Toledo case some of them were nominal parties, because they were officers of Hartford.

Mr. HENRY. Have you taken any steps whatever in these various Courts to overcome the findings of fact made with respect to that conduct?

Mr. GOODRICH. That is the point. There were no findings of fact made as to their conduct. Let me make that clear: The issue of professional misconduct and the issue of fraud on the Patent Office were not in either of these cases or any of these cases. The issue of fraud on the Patent Office was thrown in by Mr. Justice Black voluntarily and of his own volition, but nowhere,
 19a up to now, have these Respondents been charged with professional misconduct, so they had no part in these cases and no way to open them up. Naturally, petitions for rehearing, and that sort of thing were filed by the companies in both cases, but that does not affect these Respondents.

Mr. WOOD. Mr. Carter was not in any way connected with the Hazel-Atlas litigation, as an attorney or witness. He had no part in it whatsoever. The Owens-Illinois Glass Company had no place in the litigation and was not a party to the litigation. Mr. Carter had absolutely no standing in that matter which would have given him opportunity to say anything. I am told that at the hearing in the Supreme Court he was so outraged by what was going on that his friends had to restrain him from interfering and

making a statement on his own behalf. He had no right to make a statement, and did not make one, and this is his first opportunity to do anything on his own behalf.

Mr. DORSEY. I want to fortify what Mr. Wood said. After the hearing in the Supreme Court, and after the decision, Mr. Carter took up with me whether we, who were outsiders in the whole matter, had any right whatever or any opportunity to present our case to the Court, and we reached the conclusion there was no redress for us until charges were preferred, when we would have a chance to answer. Therefore, I welcome these charges.

The CHAIRMAN. Would you like a ruling on this matter?

Mr. GOODRICH. Yes, sir; I think it is extremely important.

The CHAIRMAN. Well, I think since these are the basis for these rules to show cause, they are very pertinent and the committee should have them as part of the record now in judging the case. I do not say they are accepted as proof.

21a The CHAIRMAN. We want the record to be as complete as possible. The order to show cause mentions the fact that these findings and decisions were used to a great extent as the basis, and to make the record complete they should be admitted.

22a Mr. WOOD. I don't know whether I registered a formal objection or not. I object to this being received as anything but formal background or as having any significance in the case, because my client very heartily disagrees with the findings of Judge Kloeb. I don't believe they have anything to do with the specific charge of misconduct against him.

Mr. GOODRICH. I object, for the record. These findings cannot be a substitute for the evidence which underlies them, and evidence which will be presented here.

Mr. DORSEY. As objections seem to be in order, I want to enter my objection, that I was not a party to that litigation and the Court was not trying me, and I had no opportunity to assert my defense. A finding of fact can have no weight on a party who is not heard, and I was not heard in that case.

(The Findings of Fact are as follows:)

155. Hartford and Owens had little hope of establishing control over gob feeding by means of these patents, but rather hoped to obtain such control through the issuance of a patent on the Peiler "stuffing" patent application. Hartford's efforts to obtain a patent on the Peiler "stuffing" application had proved unsuccessful, and the application stood under rejection in May 1926 (Ex. H-5520, pp. 216-219).

156. To obtain the issuance of a dominant patent on the Peiler "stuffing" application, Hartford and Owens had the Clarke article published for the purpose of influencing the Patent Office to issue the patent (Exs. 136, 137).

23a 157. This article was written by Hatch with the collaboration of Brown, Carter and Dorsey, and was signed by the union official Clarke. It was published under Clarke's name on July 17, 1926, and on October 12th of the same year it was presented to the Patent Office (Ex. H-5220) together with affidavits of Peiler, Heintzelman, and Howard in an effort to convince the Examiner that the suspended-charge feeders, covered by the claims of the Peiler "stuffing" application, had revolutionized the art.

158. On May 9, 1927, the Examiner finally rejected the Peiler "stuffing" application.

159. After the rejection, Hartford appealed to the Board of Appeals. An extensive brief was filed on behalf of Peiler by Brown and Dorsey, and this brief was supported by the Clarke Article, by affidavits of Heintzelman, Howard, and Peiler, and by an affidavit of S. S. Cochrane, Vice President and General Factories Manager of Owens (Ex. H-5220). The Clarke Article was presented as evidence that the Peiler feeder had been a tremendous success and had revolutionized the art. The Clarke Article and the Heintzelman Affidavit were presented as the statements of reluctant witnesses. Cochrane represented that the Hartford feeders had revolutionized the glass-feeding art and affirmed that the late M. J. Owens accorded to Peiler the principal credit for this advance (Ex. H-5220). On May 10, 1923, M. J. Owens had expressed a contrary opinion to F. G. Smith (Ex. H-5422).

160. The Board of Appeals rejected the Peiler "stuffing" application on the ground of anticipation by a prior Howard patent 1,315,668 (Ex. H-5220). Hartford owned this Howard patent and also employed Howard (Ex. 61). Hartford then had

24a Howard file an affidavit virtually disclaiming the subject-matter of the Howard patent relied upon by the Board in rejecting the Peiler application (Ex. H-5220, p. 724). Peiler also filed an affidavit swearing back of the filing date of the application for the Howard patent (Ex. H-5220, p. 712). Following this action by Hartford, the Board of Appeals withdrew the rejection and ordered the Peiler patent to issue (Ex. H-5220, p. 732).

162. The facts of the Hitchcock demonstration on January 25, 1924, and the facts regarding the authorship of the Clarke Article were not disclosed to the Patent Office in connection with the

issuance of the stuffing patent or to the District Court for the Western District of Pennsylvania or the Circuit Court of Appeals for the Third District in the suit by Hartford-Empire against Hazel-Atlas on that patent.

163. In the Hazel-Atlas case, Hartford introduced in evidence the file wrapper of the Peiler "stuffing" patent, including the Clarke Article. The District Court did not mention the Article and held that if the Peiler "stuffing" patent was valid, it was not infringed (D. C. Pa. 1930) 39 F. (2d) 111. In the Circuit Court of appeals, Hartford made reference to and relied upon the Clarke Article.

164. The Circuit Court of Appeals, in an opinion by Judge Buffington (Judge Davis concurring and Judge Woolley dissenting), (C. C. A. 3d, 1932) 59 F. (2d) 399, reversed the District Court and held the Peiler "stuffing" patent valid and infringed. Judge Buffington's opinion, which refers to and quotes from the Clarke Article, held that the Hazel-Atlas feeder
25a infringed the Peiler patent and gave that patent a broad and generic construction. Judge Buffington also referred to that portion of the Cochrane affidavit mentioning the great value M. J. Owens had attributed to Peiler's invention (C. C. A. 3d, 1932) 59 F. (2d), 399, 409.

165. After the decision of the Circuit Court of Appeals, Hazel-Atlas started an investigation to determine the origin of the Clarke Article (Ex. 133) in order to lay a basis for an application for a rehearing (R. 4395). To prevent Hazel-Atlas from learning the facts relating to the authorship of the article, Hartford agreed to pay and paid Clarke \$8,000 in cash and concealed the purpose of this payment by entering into a purported employment with Clarke (Ex. 932) and by disguising on its books the purpose of the payments to Clarke (Exs. 1159, 1266). Owens paid one-half of the \$8,000 paid to Clarke (R. 4126, Exs. 1157-1159).

Beyond the findings of fact which have already been put in the record, and later than that, the Third Circuit Court of Appeals in *Hartford-Empire v. Hazel-Atlas*, and *Hartford-Empire v. Shawkee*, 137 Fed. (2d), p. 763, considered a petition to reopen that case upon an alleged fraud that had been committed on the Court by the use of the Clarke article in that Court, and that opinion, of course, is before you as a matter of judicial notice,
26a because it is officially reported, but I want to call attention, by way of developing the case in an orderly way and giving the gentlemen on the other side a chance to meet the case, as we see it, to certain holdings of the Court in that case.

Mr. GOODRICH. To which we make the same objection, and I

would like to inquire whether we are being tried here for fraud on the Patent Office or fraud on the Third Circuit Court, which seems to be what you are going in to.

28a Mr. BROWN. The charges are stated in the rule to show cause, and I am stating our theory of this particular case. I would like to have a ruling.

The CHAIRMAN. I think it tends to make the record complete and the committee would like to have a record that is as complete as possible.

Mr. BROWN. In that case which I have already identified, when the Hazel-Atlas Company and the Shawkee Company went back to the Third Circuit Court of Appeals, charging that there had been a fraud committed in the Patent Office, and on the Court by the use of the Clarke article, the Third Circuit Court of Appeals considered this question of whether or not there had been a fraudulent use of the article, and I want to call the Board's attention to certain extracts—they will not be long—which point up our position on this.

At page 765 the majority opinion states:

29a "The opinion for the majority in support of the order thus entered by this Court, made frequent references to and quoted extensively from an article in a trade journal known as the National Glass Budget. The article purported to be the work of one William P. Clarke, who had signed it as author, and was titled 'Introduction of Automatic Glass Machinery; How Received by Organized Labor—by William P. Clarke, President, American Flint Glass Workers Union.' After alluding to the historic opposition of glass workers to mechanical glass blowing appliances, the so-called Clarke article went on to show that prior to gob feeders the only successful automatic feeder for a glass blowing machine had been that covered by the Owens patent, which like another patent (Brooke) operated on a principle of stream feed into a mold."

On the next page, 766, the Court said:

"The fact is that the article had not been written by Clarke, but by one R. F. Hatch, an attorney in the Patent Department of Hartford, which by that time had become the assignee of the Peiler patent application. Hatch not only prepared the article and its accompanying chart, but he also procured Clarke's signature thereto as the author, and caused it to be published in the National Glass Budget, with the understanding, assented to by the publisher, that Hartford should not be connected with it. The article appeared in the July 17, 1926 issue of the National Glass Budget. R. D. Brown, Vice President and Patent Counsel of Hartford, and V. M. Dorsey, a patent attorney for Hartford,

brought the published article to the attention of the Patent Office on October 12, 1926, with special reference to the Peiler application (Serial No. 294,792), whereupon the patent (No. 1,655,391) issued on January 3, 1928.

"It is unnecessary for present purposes to relate in 30a detail how Hatch, aided and abetted by Brown and Dorsey, as well as by H. W. Carter, of Owens Bottle Company, deliberately set about 'to get the production curve and a few statements in regard to gob feeding into print' (from a source ostensibly hostile to labor-saving glass-blowing machinery) for use in the Patent Office, in connection with the Peiler application which had already been rejected on the ground that its claims were not patentable. As the matter then stood, the Peiler application was confronted with apparently insurmountable Patent Office opposition. That Hatch, Hartford's employee, and not Clarke, a labor leader, wrote the article, and that the purpose of the methods employed in having it published was as above indicated may now be taken as indisputably established. But, sordid as is the story concerning the genesis of the Clarke article and the deceptive design and use of its spurious authorship, still it does not qualify as after-discovered evidence."

Then it goes on in various places to discuss the question of authorship of the article, and it states that the article was that of Hatch and not that of Clarke.

In the dissenting opinion of Judge Biggs, he points out that Judge Buffington in holding the patent valid and giving it a broad construction, relied heavily upon the Clarke article. For example, he said at page 773, referring to Judge Buffington:

"Believing that the Clarke article actually represented the words 'of a practical glass blower official,' the majority of this court brushed aside most pertinent evidence as to plunger-shear feeders of the prior art."

At another place he said that "Judge Buffington's numerous and extensive quotations from the Clarke article indicated its importance to his decision."

31a So much for the Third Circuit Court of Appeals. When you come to the Supreme Court you find, beginning page 997, at the outset of the opinion, a complete statement, purporting to be a statement of the facts and transactions that resulted in the filing of this article in the Patent Office, as being the article of a labor union leader, a man ostensibly hostile to the patent, and the fact that it was relied upon in the Patent Office, the fact that it was relied upon in the Third Circuit Court of Appeals, and the fact that it was a fraud upon the Patent Office and the Court.

Mr. DORSEY. May I call attention to the fact that even if there is a remote bearing of the Third Circuit Court of Appeals against

the individual defendants here because they are named, that does not carry into the decision of the Supreme Court. The Supreme Court refrained from adopting the language of the Third Circuit Court of Appeals in naming names. It does not seem to me that that has any relevancy to the charge here. No names are mentioned.

Mr. BROWN. Proceeding, I will read one or two more extracts and then I am through. The Supreme Court majority opinion said:

"Here * * * we find a deliberately planned and carefully executed scheme to defraud not only the Patent Office but the Circuit Court of Appeals. Proof of the scheme, and of its complete success up to date, is conclusive."

On this point the majority opinion is accepted by the minority opinion, which said on the question of fraud there was no difference in the Court. Justice Roberts said:

"No fraud is more odious than an attempt to subvert the 32a administration of justice. The court is unanimous in condemning the transaction disclosed by this record."

Now, if Your Honors please, that is the background and that is the case these gentlemen have to meet.

In want in addition, by way of making the record, to put into the record a certified copy of the transcript of record before the Supreme Court of the United States, October term, 1943, No. 398, in the case of Hazel-Atlas Glass Company, Petitioner, versus Hartford-Empire Company, and the transcript of the record in the Supreme Court of the United States, October term, 1943, No. 423, in the case of Shawkee Manufacturing Company, and others.

Mr. GOODRICH. Same objection.

Mr. WOOD. Same objection.

Mr. DORSEY. Same objection.

Mr. BROWN. What is your objection to these records, Mr. Goodrich?

Mr. GOODRICH. The simplest way of stating it, Mr. Brown, is they are not evidence.

Mr. BROWN. Is that your only objection?

Mr. GOODRICH. They are incompetent, irrelevant, and immaterial to these proceedings.

Mr. BROWN. Do you question the authenticity of these records?

Mr. GOODRICH. Not in the slightest.

Mr. BROWN. Do you question that the letters and affidavits contained in them were signed by the parties—

Mr. GOODRICH. That is something else. I do not question the authenticity of the records, but I simply say they are not evidence

here. That is a Court record, and even Judge Gibson wouldn't take that.

33a Mr. BROWN. Do you mean now to take the position that the Patent Office is going to have to prove the letters that are in this record, accepted by the Courts below and by the Supreme Court as having passed, for example, between Hatch and Brown, between Dorsey and Hatch, and between Carter and Brown and so forth, and that the copies in these records are not admissible?

Mr. GOODRICH. No; I will admit everything but the "so forth." As to the letters of the parties who are here, the respondents are here. We are not going to hide anything these respondents did. We are going to put it in, but we are not going to be bound by what is in that record, for instance the report of a detective named McCarthy, who never has been on the stand in that proceeding or any other proceeding for cross-examination by us. We are certainly not going to be bound in this proceeding by what that man has to say. His affidavit is in the record.

Let me make it clear, Your Honors; we want the full story here, and anything in that record that any of these respondents had to do with, we will lay before you ourselves, and any statements or affidavits of any one of these respondents in there we will lay before you ourselves, and we invite cross-examination to the fullest extent on those things, but we certainly are not going to be bound by statements of other parties that we never had a chance to meet on cross-examination.

Mr. BROWN. There is no objection to this, to these records, as to their authenticity, and that these were the records considered by the Supreme Court of the United States?

Mr. GOODRICH. No objection to that.

Mr. BROWN. They are offered as showing the records that were considered by the Supreme Court of the United States.

34a Mr. GOODRICH. Our whole objection is they do not bind these defendants.

Mr. DORSEY. Your Honor, may I state my position? I accept what is in that record as showing what I said in an affidavit filed in the District Court case, Court of Appeals of the Third Circuit. I have accepted it so much that I have printed it in my defense. I accept no other evidence that may be in this record as bearing on me, because I have had no opportunity to controvert it.

Mr. BROWN. If Your Honor please, Mr. Trimble suggests I should amplify the offer, not only to show the record actually before the Supreme Court of the United States, but they are offered as proof of correspondence and papers that passed between the respondents. The respondents are in Court now and they will

have their chance to rebut or deny these things, and certainly this is prima facie evidence that these transactions took place.

The CHAIRMAN. I understand they are not objecting on that score at all.

Mr. GOODRICH. Except in this way, Your Honor; those letters should not be binding except on the ones who wrote them. For instance, there is one letter in there from Mr. Carter to Mr. —

The CHAIRMAN. These letters were actually written?

Mr. GOODRICH. As to the identity of them, yes; but we are not just taking them here as a fact.

Mr. BROWN. They are proof of the fact that the letters were written, sent and received at the date they bear. Is that right? The materiality and bearing is a matter for argument.

Mr. WOOD. I want to state my position for Mr. Carter.

35a Mr. BROWN. Pardon me, I want that understood, that we are offering it as proof that these letters were sent and were received at or about their dates by the persons indicated on the letters.

Mr. GOODRICH. We can't admit that. How can Hatch or Brown admit all that as to things Dorsey did?

Mr. BROWN. We are offering that for that proof. You have your men in Court, and if the record is wrong you have your opportunity to rebut it.

Mr. GOODRICH. I am objecting to it for anything of that sort.

Mr. WOOD. On behalf of Mr. Carter, I say that, of course, we accept the letters which he wrote and which he received which are in that volume, as proof that he wrote and received those letters. There is no question about it, positively, and for that purpose we have no objection to that volume being considered in evidence. But as to extraneous matters, affidavits from Hazel-Atlas people in support of their case, or the Shawkee people in support of their case, transactions with which he had nothing whatsoever to do, we object to it as evidence against him on any of those matters.

Mr. BROWN. On all of this it is understood your rights will be protected by way of argument or objection at any proper time. You can move to strike out or argue the materiality, of course. We don't want to bind you on that, but we do want to put these letters before the Patent Office. If you gentlemen say this letter appears to be sent by Mr. Carter, but if he gets on the stand and says he didn't send it, we have to believe him or disbelieve him.

Mr. WOOD. On the contrary; I say we accept it as proof of that.

36a Mr. BROWN. I want to say one other thing. Mr. Trimble and I are very much surprised at this; we thought we were, if anything, helping the respondents in this case by opening the case and showing them the case they had to meet. It is all docu-

mentary. We haven't brought in any new thing. Our theory of this case is that it is a simple proceeding, that it is a matter largely of discretion with the Commissioner of Patents, as advised by this Board, and it is a case where all of the pertinent facts of any kind, from any direction, that may bear on this ought to be put before you.

In other words, it ought to be a case of liberality of proof rather than a restriction of proof. We thought we were helping out by starting with what we had before us, and then letting these gentlemen explain it, show that it was wrong, and present their case.

37a Mr. BROWN. I am now through, and we are ready to turn the case over to the respondents.

Mr. DORSEY. I simply want to make my position clear. I do not object to these records being accepted as proof of anything found in them as to what I may have said. I object to them being proof of the existence of fact as to which someone else may have said. Now, the record in Toledo I think involved over 20,000 pages. Before I could be blamed with something found
38a in that record I want it called to my attention. I don't know what every word in it is. I think I am entitled to be warned as to what part of the record bears on me.

Mr. BROWN. Mr. Dorsey, I can say now that our thought was that the only part of that record that may come in here would be your testimony, Mr. Hatch's testimony, Mr. Brown's testimony and Mr. Carter's testimony. All of you, as I understand, with the possible exception of Mr. Brown, testified in that case about the Clarke article.

Mr. DORSEY. All right as to my testimony, but Mr. Hatch's testimony was voluminous, Mr. Carter's testimony was voluminous. So far as I know, there is only one remark about me in Mr. Hatch's testimony. I don't see how there could be anything from Mr. Carter. If you have got anything in that record I would like to know what I must answer.

Mr. BROWN. Certainly, sooner or later, it will be pointed out to you.

Mr. DORSEY. That is what I want to know. I shall be prepared to answer.

51a *Opening Statement on Behalf of Respondent*
 Vernon M. Dorsey

By Mr. DORSEY:

Mr. DORSEY. Your Honors, I stand in a somewhat different position from anyone else, perhaps. As Mr. Goodrich has stated,

my connection with the Clarke article, the Hatch article, came when Mr. Hatch mailed me a copy of it out of a clear sky. I had been abroad. I came back about the end of March or the early part of April 1926, and I found on my desk a manuscript of some 14 or 15 pages, which Mr. Hatch had sent me with the request that I look it over and make suggestions. I was naturally busy, having been absent three months, having brought a large amount of work back with me, and I glanced over the article, made three amendments or suggestions, such vital things as changing "insist" to "apparent" and adding "technique" to 52a "skills". There were just three changes of that kind.

That is all my collaboration amounted to. I returned it to Mr. Hatch without any suggestion of how it was going to be used. I heard later on, Mr. Hatch writes me, that he said he was going to get Mr. Maloney to take it up. Later on he writes me that Mr. Maloney had sidestepped, but that he had seen Mr. Clarke and Mr. Clarke would be willing to accept the idea of writing an article and perhaps use the Hatch article as a basis, but that he reserved the liberty of changing or rewriting it to suit himself.

That was in May. I think sometime in June, probably the early part of June, I heard an article was going to be published by Clarke. I never told Hatch I was going to use his article in the Patent Office or any article. I couldn't tell him that until I knew what the article was going to contain, and if Mr. Clarke was going to change it, as I expected him to do, I reserved judgment on what use I would make of the article.

When the article was published, three months after it was published, in preparing numerous amendments that went into the Peiler case, Mr. Brown and myself looked around for available matter. We found among the things in the art the Clarke article. We decided it was useful. An amendment was prepared by Mr. Brown filing the article, and I signed it, referring to it as the Clarke article, because I thought Clarke had made radical changes in the Hatch article.

That is my connection with the Clarke article, all of it.

60a The CHAIRMAN. Shall we go ahead with our proof? I was going to ask if there was any objection to our combining and making a consolidated record.

Mr. DORSEY. Except, your Honor, I would like my testimony to come in by itself, because it is such a small part of the enormous picture. I would like an opportunity to present my case by itself anywhere in their case that it fits in.

Mr. GOODRICH. May we work that out?

The CHAIRMAN. Yes.

Mr. GOODRICH. I am sure we can adjust that between us.

Mr. BROWN. Mr. Dorsey, the testimony of these other men so far as it affects you will be part of your case.

Mr. DORSEY. Yes; but so far as I know they can't say anything about me, because I didn't see them.

Mr. BROWN. But if there is anything about you—

61a Mr. DORSEY. Oh, yes; it is sworn testimony, and I have an opportunity to cross-examine.

Mr. GOODRICH. I think we all understand that although we have four cases here, there will be but one record.

The CHAIRMAN. Yes.

Mr. GOODRICH. If agreeable, your Honor, I would like to call Mr. Clarke and ask Mr. Hirsch and Mr. Parham to examine him.

78a Q. Mr. Clarke, I show you Respondents' Exhibit No. 1, and I will ask you whether that is the paper you produced as the original of your article.

The CHAIRMAN. When you say "Respondents", do you mean all for respondents?

Mr. HIRSCH. Mr. Goodrich and I represent Messrs. Brown and Hatch. The reason I called it Respondents' Exhibit No. 1 is because that is what the reporter has marked it. Maybe it should be called just Exhibit 1. I think the point you make is well taken.

The CHAIRMAN. What do you think, Mr. Brown? Should we mark on the exhibit on whose behalf it is being presented?

Mr. BROWN. I should think it would be offered on behalf of all, and if anyone wishes to exclude himself from it, his counsel should so state. Otherwise, it should refer to all.

79a Mr. HIRSCH. I think, your Honor, if you are going to make a distinction between them, we should have this marked "Hatch-Brown", and when we put these exhibits in, if anybody wants to adopt them, they can adopt them, rather than putting the burden on the other fellow of saying, "We don't want the other man's exhibits."

Mr. BROWN. We are assuming that the exhibit applies to all of the parties here. This is the Clarke article?

Mr. GOODRICH. I think that particular one doesn't matter.

Mr. BROWN. This is the Clarke article with which everybody is concerned, and it does not seem to me that you should offer it for one and not for the other. If you don't offer it, we will offer it for all.

Mr. DORSEY. There is a distinction between the party who offers the exhibit and the party which doesn't. I am not offering that exhibit. I am not going to object to it, but there may be a case in the future where I would object to it.

It would seem logical that that be offered on behalf of Brown and Hatch. Why not make it "HB" exhibit?

Mr. BROWN. All right, then on cross-examination we will offer it on behalf of all.

Mr. DORSEY. Then, I will object because it is not relevant.

By Mr. Hirsch:

Q. Mr. Clarke, I show you HB Exhibit No. 1, and I will ask you whether that is the paper you produced as the original of your article.

A. It is.

80a Mr. BROWN. If your Honor please, in view of Mr. Dorsey's objection, I would like to know what the status of Mr. Clarke's testimony is with respect to the Dorsey position. Are you attempting to exclude the effect of the Clarke testimony from your case?

Mr. DORSEY. Not at all. If I think it should be excluded, I will say so, but it is certainly not relevant against me.

Mr. BROWN. But it is part of his testimony.

Mr. DORSEY. Part of his testimony but it is going into the joint record.

Mr. BROWN. You can't take part of his testimony without the exhibit, and exclude the exhibit.

Mr. DORSEY. I am not offering this. I am resting on a point of procedure. Here are a number of defendants whose interests may not be alike. A thing that may be relevant against A, may not be relevant against B.

Mr. BROWN. Do you disclaim the effect on you of any testimony Mr. Clarke has given?

Mr. DORSEY. I don't think it has any effect on me. I should think, your Honor, it would be perfectly competent to let it all go in, and then if anybody wants to object to the relevancy as to them, they can specifically object.

Mr. BROWN. That is all right. That is what I thought they were going to do. As I understood, you were departing from that.

Mr. DORSEY. No, no; not at all.

The CHAIRMAN. The point is this, as I see it: Mr. Brown and Mr. Hatch are not making a case in favor of Mr. Dorsey, necessarily, whereas, as a matter of fact, they may be making a case against Mr. Dorsey, and Mr. Dorsey is not going to admit it is testimony on his behalf when it may be adverse to him.

81a Mr. BROWN. Mr. Dorsey has to declare himself now as to whether this witness is testifying for him or not. He cannot stand by and hear it and then take his choice as to whether he likes it or not. These men are all respondents on the hearing here. We want to have one hearing, on one record.

The CHAIRMAN. That is right.

Mr. BROWN. He must be bound by it or not bound by it. He cannot take a piece here and exclude the other part. He has to take it or leave it.

The CHAIRMAN. He has the right to cross-examine.

Mr. BROWN. Of course he has.

The CHAIRMAN. He cannot cross-examine his own witness.

Mr. BROWN. I think in a proceeding like this, he can cross-examine to bring out any parts of Mr. Clarke's testimony that would be pertinent to his case. I don't think you would call it cross-examination. I would call it continued direct examination on behalf of another party.

The CHAIRMAN. This testimony is being presented to the Committee as a story. That is the way we are going to look at it. We are not going to look at it as on the basis of Mr. Dorsey admitting the truth of everything Mr. Clarke says.

Mr. DORSEY. Or the relevancy to me or the competency against me. I want to reserve a privilege, when the record is completed, if necessary, of objecting to the competency or relevancy of any testimony directed against me.

82a The CHAIRMAN. I think it would be relevant. You have the privilege of cross-examining.

Mr. DORSEY. It may be relevant, for instance, if the question of my knowledge is involved. But if some testimony is given that does not bear on my knowledge that testimony is not relevant against me. Before it can become relevant against me, knowledge has got to be brought home.

Mr. GOODRICH. I think if we go ahead as your Honor suggests and make this record and give to each of the respondents the right to protect himself by cross-examination, that will be all right. We will identify these exhibits as they come in as to the party to whom they apply.

Mr. BROWN. Is that statement of Mr. Goodrich acceptable, Mr. Dorsey?

Mr. DORSEY. Perfectly.

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311a KARL E. PEILER, called as a witness on behalf of the Respondents Hatch and Brown, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

314a By Mr. Goodrich:

Q. What happened to the application, Mr. Peiler?

A. The application got into interference very promptly. It was involved in several interferences, and finally got clear of inter-

ference in 1925, I believe, and the next amendment was made in 1926, and from that time on there were various amendments made, various affidavits filed, and then there was a hearing before the Board of Appeals in July 1927, and after that hearing there was a rejection..

Then I put in a statement of priority, that is to say,
315a I put in an affidavit as to my dates of reduction to practice, and that was supported by several other affidavits, and that disposed of one reference of the Howard patent. I had formerly put in several other affidavits, but they had not gone back far enough, not any further than some time in July 1917, but this last affidavit took care of that requirement.

I personally addressed the Board of Appeals in July 1927. I went through the commercial history of the art, the utility and application of the invention involved in the application, and explained the reasons for this utility, and then I took up the prior art references and showed how my invention differed from the prior art. When I got through I devoted considerable time to the commercial success of the invention. The Board told me that the matter of commercial success was immaterial, and I left with the distinct impression that it was still a combination of prior art references at issue, one of which was the Howard patent, which I later overcame as a reference. Shortly after the affidavits giving my dates were filed the application was allowed.

Q. Had you previously prepared and filed an affidavit with reference to the commercial success of this invention, this claimed invention?

A. Yes.

Q. When did you start working on that?

A. I started working on that, first as a complete historical record, at Mr. Brown's request. He requested that of me in January 1926, and I worked on it, off and on as I had time, and produced, I should say, between 80 and 90 pages of material. That was gone over very very carefully in the summer of 1926 and certain parts were cut out; it was boiled down, and Mr. Brown, Mr. Dorsey, and I went over moving pictures and photographs and
316a other records that we had, and as a result it boiled down to that affidavit which I filed, I think in October 1926.

324a Q. Did Mr. Brown consult with you about the Clarke article at any time before it was published?

A. No.

Q. Or before it was prepared, did he discuss with you the desirability of historical articles to be published by some other disinterested source?

A. I didn't know he was going to publish it, but I did know he wanted an article prepared, and that was in January 1926. I can't say it was an article. Let us say it was a history. How he was going to use it—it was used in an affidavit. Affidavits were mentioned, that is, to put in there with the application.

Q. Was that in a conversation between you and Mr. Dorsey and Mr. Brown?

A. Yes.

Q. And at that time, in January 1926, you discussed the desirability of such an article?

A. Discussed the desirability of a history of the glass feeding art.

Q. Did you at that time discuss the desirability of having such an article come from an apparently disinterested source?

A. No. These words were not mentioned. Moreover, when you say "such an article" you seem to refer to an article like the Clarke article. This was not such an article. This was a history, primarily, and that I prepared.

Q. Well, that was preliminary to leading up to the Hatch article?

A. No, it led up to an affidavit which is filed in the application.

325a Q. Well, in January 1926, you and Mr. Brown and Mr. Dorsey discussed the desirability of an historical article?

A. Yes—a history, I would put it.

Q. And—

A. Now, from that history, you see, we culled certain things, we selected certain things.

Q. Well, you also discussed the desirability of having such a history for use in the Patent Office in connection with the pending application?

335a ROBESON D. BROWN, a Respondent, was called in his own behalf and having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

347a Q. Going back to 1925-1926, you knew Mr. Vernon M. Dorsey?

A. Very well, indeed.

Q. Who was Mr. Dorsey?

A. Mr. Dorsey was a Washington patent attorney, member of the firm of Dorsey and Cole. He was in charge of the prosecution of some of the more important of the Hartford-Empire ap-

plications under associate powers of attorney from Mr. William H. Honiss, who was the company's regular solicitor. Those applications, as it happened, were the ones that were in interference. Mr. Dorsey conducted the interferences, and when the applications came out of interference, he continued to be in charge of the applications for ex parte prosecution.

Q. And you knew Mr. Roswell F. Hatch?

A. Very well, indeed.

Q. And who was he at that time?

A. At that time he was in the invention department, so-called, of the Hartford-Empire Company. That was not the same as the patent department, but was a sort of contact agency between the patent department and the engineers. It is a very useful thing when you have a corps of engineers working on things that may result in patentable matter, and you also have a group of
348a specification writers, to have somebody as a go-between who will make sure that the information is extracted from the engineers and put in proper shape for the patent solicitors. That was Mr. Hatch's principal function, and in that he reported to Mr. Peiler.

He did various other things, because he had a wide acquaintance with the company's business, and its customers, so some of the rest of us used to use him for various jobs of one sort and another.

Also, one principal thing that Mr. Hatch did was to keep the company's historical records of machine and process developments.

Q. Was Mr. Hatch an attorney at law, so far as you know?

A. No.

349a Q. Now, Colonel Brown, I show you Exhibit 1 attached to the affidavit of Henry W. Carter, which I assume later will be offered in evidence. Have you any objection to my using the exhibit?

Mr. BROWN. Not at all.

By Mr. GOODRICH:

Q. Which is a letter of December 11, 1925, purporting to be signed by you and addressed to Mr. Carter. Did you write that letter?

A. Yes.

Mr. GOODRICH. I will ask Mr. Hirsch to read that letter.

(Whereupon, Exhibit 1 to the affidavit of Henry W. Carter was read by Mr. Hirsch.)

Mr. BROWN. May we for convenience point out that this same letter is printed in the Hazel-Atlas Exhibit B, at page 40.

Mr. GOODRICH. Yes. Would you gentlemen note the correction of the typographical error in this last line, which Colonel

Brown has called to my attention, where the word "keeping" is evidently a stenographic error and should be "feeding."

The WITNESS. It is not an error in printing. The error crept in somewhere along the line in making copies.

By Mr. GOODRICH:

Q. Now, Colonel Brown, what later became of this letter 350a of yours to Mr. Carter? Please tell the Committee what the situation was with respect to the patent application and what later became of this letter:

A. Perhaps this is as good a time as any to mention the application. I thought perhaps that might come in a little later, but it is all right to do it now, I think.

The application was filed in 1919—

By Mr. BROWN:

Q. This is the Peiler application?

A. This Peiler application, Serial No. 294,792, out of which resulted Patent 1,655,391. It was filed in 1919, had one office action, and then was put into a couple of interferences. They were not so bad; they only lasted a year or two.

Then there was an amendment, and then a flood of interferences started, which involved this application and various others. Altogether this application was in ten interferences, the first two, and eight others, but that was only a small part of the story.

This and related applications were in a tremendous number of interferences. I counted over forty active ones at one time shortly after I went to Hartford, and they lasted very vigorously until the fall of 1925.

All sorts of motions, some of them were regarded as dilatory, motions to add claims, motions to dissolve, motions to shift the burden of proof and everything else anybody could think of, were made. The thing got in a terrible tangle, and in 1925 we were able to clear it out by some settlements we made, so that the interferences came to an end. Not many of them came to final adjudication. Most of them were dissolved without prejudice, because the ownerships of the contesting applications were brought together, and then the job was to straighten out the cases and see that the claims got in the right places.

351a In view of the interferences there were a great many dead claims to bury, and a good many wounded ones to fix up. Then there was the question of additional claims which were brought to mind by the interference proceedings.

Mr. Dorsey and I were very much engaged in that for two or three years. Some other people were, too. In the fall of 1925 we were just beginning that chore, and this application that we are speaking of was one of the principal ones we had. We thought

it was clear of the art really, although there was an endless amount of what we regarded as paper art, and it covered a thing that was in use in all our machines, and a lot of machines other people were putting out, so it was obvious we ought to do a job in making a proper showing in that case.

While the thing was in that situation, and perhaps even before, I remember that Mr. Carter, when we were chatting together about the patent situation, more than once said, "It is too bad that the Patent Office has to pass on these things just from copies of patents. It is too bad they can't know what has happened in this art, and I certainly wish somebody would write it up so that they would know. Then they would be better able to come to proper decisions on these claims."

352a Q. Now, Colonel Brown, was that article ever written, the one discussed between you and Mr. Carter in these letters?

A. Yes; an article, or the effect of an article, was certainly written.

Q. Did you consult Mr. Howard on the matter, or who did you get to write such a history?

A. No; I doubt if I did. I would like to say first that this correspondence between Mr. Carter and me was the beginning of quite an extensive misunderstanding, a lot of people having thought that was the way the Clarke article started to come into being.

Well, it was not, at all. Carter's suggestion was carried
353a out in an entirely different way. I remember that after this exchange of letters, when Mr. Carter said no, he didn't think he was qualified to prepare an article, Mr. Dorsey and I considered it pretty carefully. We wondered who would be the best qualified, and either he or I, I rather think it was I, remarked "Well, what is the matter with Peiler? He is the applicant, of course, and it is not so good to support your case by the applicant's own affidavit if there is anybody else available, but, after all, he is the one who knows, has been in it all this time. Why not have him write a history of this art and what has happened in it? He knows a lot about the prior art patents, too, so we will extend it to include that."

And that is what we did. The resulting affidavit which Mr. Peiler prepared, and he worked a long time on it, as he told the Committee yesterday, and we worked on it, too, is the affidavit which appears in the file wrapper, Department's Exhibit E, at page 266.

That was supplemented by other things, other affidavits. There was one by Howard, relating to his own apparatus, and also

a prior art patent he happened to know something about, and then, more particularly, since we are talking about the result of Mr. Carter's suggestion, we finally got from the Owens Company an affidavit by their Mr. Cochrane, who was then, as he says, vice president and general factory manager of the Owens Bottle Company.

That added to Mr. Peiler's affidavit particular facts about the Owens Company's experience with their own suction machine, and with feeders.

A short answer to your question is that Mr. Carter's suggestion was ultimately carried out, but not in the form of a printed article.

Q. But by means of the Peiler affidavit?

A. That is right.

354a Q. Was that the end of the idea as between you and Mr. Carter?

A. Yes. He and I have talked recently about it, and neither one of us can remember that we had any discussion at all with regard to the Clarke article or, indeed, with the preparation of the Peiler affidavit.

Q. As I understand your testimony, is this exchange of letters related in any way to the Clarke article?

A. Oh, not at all.

Q. When was the first time you heard of the Clarke article? Will you just tell the Committee in your own way your connection with the preparation and publication of the Clarke article?

A. Well, with the preparation, composition of it, I had nothing to do, but I did come in contact with it on several occasions in discussions with Mr. Hatch, first, when he told me his idea for an article, and next, when he showed me a draft of it, and next, when he told me Mr. Clarke had taken it over and was going to put it in shape and publish it and, finally, when he told me that Mr. Clarke had done so, and that it was coming out.

358a Q. Will you tell the committee—

A. To finish up my contact with Mr. Hatch on it, and then he dropped out of the story, I asked him to get a copy of the article certified by a little affidavit of the publisher that it was a true copy. He did that—I have forgotten the date. Then I turned that over to Mr. Dorsey and we included it as one item in our collection of publications and affidavits, of which there were several.

367a Q. At the time you filed this Clarke article along with these other publications you have mentioned, there was a

covering letter addressed to the Commissioner of Patents, was there no?

A. Yes; that appears on page 261 of the file wrapper as printed.

371a That is signed "Karl E. Peiler, by Dorsey and Cole, Associated Attorneys."

Who drafted the letter, Col. Brown?

A. I did.

Q. But you did not sign it?

A. No; they had an associate power of attorney.

Q. I notice attached is the affidavit of Thomas A. Kimes, covering the publication in the Budget. Is that the affidavit you asked Mr. Hatch to get for you?

A. Yes.

Q. In drafting this letter which you now offer, as you drafted it, or as it may have been changed by Dorsey and Cole, and submitted to the Patent Office as a covering letter for the matters to be filed, did you consider you were under any duty to the state in that letter that Mr. Hatch had gathered the data and done the initial drafting of the Cole article?

A. No; I had no such feeling.

374a Q. I will ask you to read into the record every word that is said in the brief about the Clarke article.

375a A. That came at the very end, when we were making our peroration, so to speak. On pages 477 and 78 there is this statement about the Clarke article, and I say now and have done with it, that this statement and the statement that has already been read in the letter of October 11 are the only statements that were made by anyone in the file wrapper about the Clarke article. There was no reference whatever to it by the Primary Examiner or the Board of Appeals in any of their actions or decisions. There was no further reference by us after this which I shall now read. —Page 477 of Exhibit E:

"That the appellant's feeders have been a tremendous success and have revolutionized the art from the standpoint of economy is recognized by reluctant witnesses. We call attention to the article by William P. Clarke, President of the Flint Glass Workers' Union (a union whose members have been displaced by the feeders in question), and published in the National Glass Budget for July 17, 1926, which is an exhibit in this case. (See Appendix, page 76.) Clarke in the exhibit in question gives a graph showing the rapid acceptance of suspended charge feeders which he terms 'gob feeders' and stresses the great displacement of manual workers occasioned thereby. Heintzelman, an experi-

enced manufacturer of 35 years' experience (see Appendix, pages 69 and 73), states that there have been revolutions in the glass feeding art in those years. The first was the introduction of the Owens machine before alluded to, and the second was the introduction of appellant's suspended charge feeders. The graph of Clarke shows how the introduction of the suspended charge feeders prevented further introduction of Owens machines."

Mr. Dorsey and I spent a great deal of time on that brief, and I believe Mr. Parham also.

Q. What do you mean by the term "reluctant witnesses" that you use there?

A. I asked to be interrogated about that, because there has been a good deal of talk about it in some of the litigation. Opposing counsel deduced from those words that Mr. Dorsey and I were talking about Clarke as a reluctant witness, and Heintzelman as a reluctant witness. Of course, that was not so. Neither of them were reluctant. I happen to remember that that particular paragraph which I have read was dictated by Mr. Dorsey in my presence, and I remember the "reluctant witnesses" and I know that what was meant by "reluctant witnesses" were the presidents of the labor unions whose speeches are quoted in the Clarke article, and who, of course, were reluctant to have their members displaced. So far as Mr. Heintzelman is concerned, a couple of pages later there is an affidavit in which he points out his interest in the Hartford Company, so obviously he was not reluctant and was not being so put forward.

377a Q. Let us get on. What happened next in the Patent Office? Was this appeal allowed? Was the patent granted on this appeal?

A. Oh, no. I think at the hearing we filed some more affidavits, and I think after the hearing, but before the first decision, we filed the Cochrane affidavit, which I think I have already mentioned. That was received by the Board of Appeals on August 9, 1927, about three weeks after the hearing, but before the decision.

Q. Let me interpose. You attended the hearing, did you?

A. Yes; I took part in it along with Mr. Dorsey and Mr. Peiler. We thought the thing was important enough so that we did a rather unusual thing; we asked the inventor himself to appear and asked the Board to hear him.

385a Q. Who were counsel in that case?

A. For us, the counsel who signed the brief were Mr.

386a Clarence P. Byrnes of Pittsburgh, the late Thomas G. Haight of Jersey City, Mr. V. M. Dorsey who is here, the late Mr. William J. Belnap of Detroit, the late Mr. Herbert Knox Smith of Hartford, and myself.

Q. And on the other side?

A. On the other side Mr. Charles Neave of New York, who had not tried the case below, but who did make the argument, Mr. Stephen H. Philbin of New York, who had tried the case below, and I think Mr. Howard R. Eccleston was on the defendant's brief, too. I am not quite sure about it.

Q. Mr. Eccleston of Washington?

A. Of Washington, yes.

Q. Anyone else?

A. No.

Q. What was the nature of the discussion you had referring to the Clarke article?

A. After we got Judge Gibson's decision against us, where he held the patent not infringed, we set about making our showing to the Court of Appeals. I remember that somebody drafted some notes for a brief—I don't remember who that was, maybe Mr. Dorsey did it, maybe I did it, or Mr. Belknap, and Mr. H. K. Smith looked at it and said it wasn't any good because it didn't emphasize the commercial success of this invention. He thought that was exceedingly important. Then apparently someone said, "You do it," and he did undertake to work up the notes for that portion of the brief dealing with the commercial success of the invention, and after this matter came up, during the past year, I located a memorandum which I will refer to in a minute.

What we did was that both Mr. Smith and I went through the trial record and picked out everything we could find that had to do with this question of commercial success. There were quite a number of items, among them this Clarke article, and 387a the publications in the file wrapper, and so on, and I didn't know, and he didn't know, whether it was proper to refer to a file wrapper item in the brief, because anything in a file wrapper is not really in evidence—the whole file wrapper is, but merely to show what happened in the Patent Office—and I didn't know whether it was right to refer to such an item in the brief or not. Neither did Mr. Smith. Neither of us had ever had the question before, so we consulted the trial counsel. I know that Mr. Byrnes was consulted, and I know that Mr. Belknap was consulted. That Mr. Dorsey was, I think, but I am not quite sure, but I know Judge Haight was not, because he had not gone into the case at that time as deeply as later. What they told us was that a thing in the file wrapper that went right to the question of infringement or validity would probably not be proper to refer

to, but things like this Clarke article and the German book and so forth that were quite collateral and background stuff would be all right, and relying on that Mr. Smith made a memorandum, which I rather recently turned up in the files, within the last six months or so, and which I attached to my affidavit as Exhibit 5.

395a Q. Did you during this correspondence with Judge Haight and the Third Circuit Court and Mr. Barnett, consider yourself under any duty to disclose or otherwise call to the Court's attention the fact that Mr. Hatch had gathered the material and made the initial draft of the Clarke article?

A. Not at all, and for the same reason, that it was Clarke's article so far as I was concerned, and I think that was the view of the other counsel. I should say at that time the only other counsel involved were Judge Haight and Mr. Belknap. I don't think Mr. Byrnes or Mr. Dorsey were consulted.

404a Q. Was there ever any attempt on your part or on Hatch's part or Dorsey's part or anybody, so far as you know, to suppress the facts concerning the writing and publication of this article?

A. No, the whole thing seemed to be perfectly proper and still does, so why should we hush it?

415a

CROSS-EXAMINATION

418a Q. And after it was published, or even before it was published, you told him you proposed to file it in the Patent Office?

A. I rely on his recollection rather than mine about that. My recollection is very definite that I asked him when it was coming out, shortly before it did come out. I wouldn't be surprised if I told him then we might put it in the Patent Office, but I am not sure that I did. I am quite sure that I must have told him that when I asked him to get a certified copy of it but, of course, until it was actually published neither Mr. Dorsey nor I could tell whether we wanted to use it or not. It depended on what was in it.

429a Q. Well, let us get back to your affidavit. I refer you to page 53 of the Hazel-Atlas record, the paragraph beginning at the middle of the page, which reads as follows:

"I considered that publication of such an article was desirable for two purposes. One was to inform the Patent Office of the

facts contained in the article for the information of the Patent Office examiners in connection with their consideration of certain pending patent applications of the Hartford-Empire Company, particularly an application of Karl E. Peiler, Serial No. 294,792, filed May 5, 1919, upon which was issued the Peiler patent No. 1,655,391 involved in both of the above entitled suits." You said that in your affidavit?

A. Your point is that that is not consistent with my statement that the article was not prepared for the Patent Office?

Q. Yes.

430a A. Because it was not; it was prepared and then picked up by Mr. Dorsey and me to put into the Patent Office, which is quite a different thing.

Q. Didn't you in your affidavit here, even before it was published, consider the publication of such a document would be a good thing?

A. Yes.

Q. For use in the Patent Office?

A. As I told you before, before I ever saw the published article I considered, if it turned out the way Mr. Hatch had prepared it, that it would be a good thing to put in.

447a Q. And is it not a fact that you, Mr. Dorsey, Mr. Carter, and Mr. Hatch all testified as witnesses for one party or another in that litigation?

A. In that litigation; yes.

453a Q. Mr. Brown, during the years 1925 and 1926, is it not a fact that you and Mr. Dorsey and Mr. Carter were in frequent conference about the patent situation of the Hartford-Empire Company and the Owens-Illinois Company?

A. We had a great many conferences; yes.

Q. And you were working in close cooperation during these years, were you not, on the patent situation?

A. From time to time; Mr. Dorsey and I were together a good deal of the time. I probably spent two-thirds of my time in Washington during that period.

Mr. Carter we would meet once in a while. I can't tell you how many times, because I don't seem to have kept a very good
454a record of where I was and who was with me during that particular period, but he did meet with us quite often during that period.

455a Q. Coming back to 1925, you and Mr. Carter talked about preparing a historical article—

A. Yes.

Q. To be used in the Patent Office.

A. Yes.

Q. And Mr. Carter had declined to do that?

A. Yes, as indicated in his letter.

Q. Then, did I understand you to say you took up with Peiler, the preparation of such an article?

A. Not directly. I think the next thing that happened, as I said this morning, was that Mr. Dorsey and I—I know I, and I think Mr. Dorsey was in on it—considered who would be the best man to make this showing to the Patent Office of facts which would carry out this idea. We thought it was a good idea.

456a We thought of various people, and as I said before, I think it was my suggestion that Peiler, after all, knew the most about it, so he had better do the work. So then we took it up with him. I should think that was along in February or so of 1926.

Q. Then Mr. Peiler proceeded to prepare an accurate and detailed historical account and that was filed in the form of an affidavit?

A. Yes. His account was headed right toward the application, the subject-matter of the application, this plunger gob feeding thing. That was filed in October; yes.

Q. Mr. Dorsey knew about that conversation with Mr. Carter in 1925 about the preparation of the article; did he?

A. I don't know whether he did. I doubt it.

Q. You don't know whether he did or not?

A. No.

Q. Did he know about Peiler's preparing the document that was put in as an affidavit?

A. Oh, yes. Yes, he did; and I think he was in on that with us quite a lot.

Q. Do you know to what extent Mr. Dorsey knew about the article that was being drafted by Mr. Hatch?

A. No; except this: It seems to me that in the draft that I saw, or perhaps one of the drafts—I am not sure whether it was one or more than one—it seems to me I saw a word or two that Mr. Dorsey had changed when Hatch showed it to me.

Q. So you knew Mr. Dorsey had checked it at the time you saw it?

A. I recognized those few words were in his handwriting; yes. That is one of the slips of memory that comes back, when you ask me.

457a Q. Did you go abroad at that time, or was it Mr. Dorsey who went abroad?

A. Dorsey, I think. I didn't go abroad until 1932.

461a Q. When that was done, nothing was said to the Supreme Court of the District of Columbia about the origin of the Clarke article?

462a A. Oh, no. The matter was still more remote than it had been before, because they were just lining up the decisions of the other Circuit Court of Appeals in the Peiler cases.

Q. And you and Mr. Dorsey were counsel in that case in the Supreme Court of the District, were you not?

A. I doubt if I was. I know Mr. Dorsey was. Whether I was on the brief or not, I don't remember. I don't think I was.

465a Q. And what if anything did Mr. Carter have to do with the preparation of the brief before the Board of Appeals in the Peiler application?

A. Nothing whatever. Mr. Dorsey and I did that.

The CHAIRMAN. Mr. Dorsey, do you wish to ask any questions?

Mr. DORSEY. I have no questions.

469a ROSWELL F. HATCH, a respondent, was thereupon called as a witness, and after having been duly sworn, testified as follows:

DIRECT EXAMINATION

484a Q. You had, I believe the record shows, submitted the article or the drafts of the article to Mr. Dorsey, Mr. Carter and Mr. Brown. Do you remember anyone else?

A. Well, of course there was Maloney and Clarke.

485a Q. Did you get any help from Col. Brown on it?

A. He was not helpful at all—well, he looked at it, but he didn't do anything to it in any way whatever that I can remember.

Q. He didn't give you any help on it?

A. No.

Q. How about Mr. Dorsey?

A. Yes; he put two words in, I think, and very likely he may have given me some advice. I may have discussed it with him, but as to anything he did, I think there were two words he put in.

510a

CROSS-EXAMINATION

512a Q. Did I understand you to say that you never had any idea in preparing this article that it would be used in the Patent Office?

A. That is right; yes, sir.

Q. That is, until you knew it was to be filed when Mr. Dorsey, or Mr. —

A. Somewhere about a week before it was published.

Mr. DORSEY. I don't think the testimony shows that Mr. Dorsey told him.

Mr. BROWN. Perhaps not.

Mr. PARHAM. I don't think there has been any testimony that Mr. Dorsey told him anything about the intention.

Mr. BROWN. All right; I didn't mean to say he did.

513a

By Mr. BROWN:

Q. In that same letter, the last paragraph reads as follows:

"It is my present intention to revise the article in view of your comments and others which I expect to receive from Mr. Dorsey and then see what I can do with President Maloney. I feel sure that after such revision there will be nothing objectionable to you so that I need not hesitate in letting it appear in print, if I can make the necessary arrangement. Of course I think you understand that the whole object of the article is to make an excuse to get the production curves and a few statements in regard to gob feeding into print." You wrote that letter, didn't you?

A. Yes, sir.

Q. That is what you meant when you wrote it?

A. Yes, sir.

526a Q. Is it your position that Clarke was the author of that article?

A. There again I don't know. You can't say that I was the author. You have to include Mr. Dorsey and Mr. Carter. It was Clarke's article. As to the legal phraseology, you will have to decide that for yourself.

544a Q. Well, now, we have talked about Mr. Carter's connection and Mr. Brown's connection. We will now take up Mr. Dorsey. You submitted a draft of this article to Mr. Dorsey before you submitted it to Clarke, did you not?

A. Yes.

Q. And you conferred with him as to the contents of that article?

A. I had some correspondence, and without doubt I did mention it to him verbally, but I don't remember it particularly.

545a Q. Did he tell you at that time that he found in that draft material which he wished to place before the Examiners in the Patent Office?

A. No.

Q. Did Mr. Dorsey know that you were going to have this published under the signature of Mr. Clarke?

A. I think there is a letter to Mr. Dorsey in which I told him that.

Q. So he did know that?

A. Well, that is my belief—yes; I was right. On May 20, 1926, I wrote to Mr. Dorsey.

Mr. GOODRICH. This is a letter attached to Mr. Dorsey's affidavit.

The WITNESS. I wrote to Mr. Dorsey and told him that Mr. Clarke was going to revise and publish the article over his own signature.

By Mr. BROWN:

Q. Well, now, Mr. Dorsey to your knowledge at that time was the solicitor in the Peiler application, wasn't he, that is, the attorney in the Patent Office?

A. I knew that Dorsey and Cole had associate powers of attorney in a great many of our applications. In fact, at times I think they had them in all of them, so I probably did know it.

Q. And didn't you tell Mr. Dorsey in your letter of May 20, 1926, quoting from page 16 of the Dorsey affidavit: "I will see that you get a copy of some journal in which this article appears when it comes out"?

A. Yes.

Q. And didn't you understand that he proposed to use that in the Patent Office?

A. No.

Q. What did you think he wanted with it?

546a A. Well—

Mr. DORSEY. I don't know what Mr. Hatch might think I intended to do is competent evidence against me.

The WITNESS. I would be glad to tell you why I sent the copy to Mr. Dorsey.

By Mr. BROWN:

Q. Before you answer, in view of Mr. Dorsey's objection, I am going to read the paragraph just above the one I did read. It is as follows, beginning on page 15 of Dorsey's Exhibit C:

"It was quite amusing to hear Clarke imply that Maloney was a 'liar'. I explained to Clarke that that might be so, but I had based my statements on printed publications which I accepted without question. Clarke said that he would rewrite the article to a considerable extent, I suspect, and publish it in the Trade Journal. I fear I may have to go out to Toledo again to get Clarke to show some speed in this matter and perhaps to supervise what he publishes. I think he understood just what we want published, but he might unintentionally destroy some of the propaganda which we planned." That is in your letter to Dorsey, isn't it?

A. Yes, sir.

Q. Was Mr. Dorsey interested in propaganda except for Patent Office purposes, so far as you know?

A. Mr. Dorsey, as you probably know, had been connected with the glass industry for a great many years, long before I was, and he was interested in anything relating to the glass business, the same as Dr. Barnett. When that was published I sent copies to people outside of the manufacturing trade who were interested in the glass trade. Mr. Dorsey was one of them.

547a Q. You think he had no interest from the point of view of Patent Office prosecution in this article; is that right?

A. I didn't know anything about it, and I gave it no thought. As I say, I gave it no thought whatever. If I had, if I had been asked, I would have said, "Well, I don't see why not. The article is true, properly signed, use it for anything you want to." But I was never told that that is what he was going to do with it.

Q. And it didn't occur to you he was going to use it in the Patent Office?

A. No; because I didn't know anything about the prosecution of the application, and whether it would be of any advantage in any case or not.

Q. Did Mr. Dorsey or Mr. Brown tell you that contemporaneously Mr. Peiler was writing a detailed history of the glass feeder art?

A. No.

566a By Mr. DORSEY:

Q. Mr. Hatch, during your cross-examination reference was made to a letter from you dated May 20, 1926, which is printed in Exhibit C of my printed papers. Did you write me that letter?

A. Yes.

Mr. DORSEY. That is all.

597a HENRY W. CARTER, a Respondent, was called in his own behalf and, having been first duly sworn, was examined and testified as follows:

617a CROSS EXAMINATION

622a Q. I will ask you the same question, do you recall any discussion with Mr. Dorsey about the use of the Clarke article in the Patent Office?

A. So far as I can recollect, I never had any contact with Mr. Dorsey at all at any stage in the game, either before or after the article was published or in connection with the Patent Office.

Q. Mr. Carter, I don't want to tire you, but I would like to ask a question or two. Do you remember this letter of yours to Mr. Boshart that is attached to your affidavit as Exhibit 7, dated May 25, 1926? Do you remember that letter?

A. Certainly.

623a Q. Did you ever show that letter to Mr. Brown or Mr. Dorsey or Mr. Hatch?

A. I never showed it to Mr. Brown or Mr. Dorsey, but I am not certain whether Mr. Hatch saw a copy of this. I might have sent him a copy; I don't know.

Q. Will you look at the end of the letter to see if there is indication that you sent any copy of that outside the Owens office.

A. I don't see anything to indicate it.

Q. It was an interoffice communication, was it not?

A. It was; yes.

Q. And in that you state, as you have stated in your testimony, that Hatch intended to file the Clarke article in the Patent Office, and you have testified that that was your assumption.

A. That is pure assumption on my part.

Q. My question is, you may have been mistaken in that assumption?

A. Yes. As I look back, I was making that statement on my previous assumption that what Mr. Hatch was working on was an article in line with my suggestions of the previous December or previous fall, to Mr. Brown.

Q. You thought your own suggestion was thus being carried out?

A. That is exactly right.

Q. Did Mr. Brown or Mr. Hatch write anything or say anything to you that you can recall that would give support to that assumption?

A. No.

Q. And so far as you know, that assumption was not based on anything that Dorsey, Brown, or Hatch said to you?

A. That is correct.

624a Q. Now, there is one other point in the letter I want to ask you about. You write, "He has prepared it with the idea of getting it printed in the name of some apparently unprejudiced authority." What did you mean by "apparently unprejudiced authority"?

A. Well, I used the "apparent" in its primary meaning, obvious, or manifest, and "unprejudiced"—of course, that speaks for itself. Mr. Clarke was, as I regarded him, both a manifestly unprejudiced individual, and a recognized authority.

Q. Did you mean a disinterested authority?

A. Certainly, when I said "unprejudiced", I meant "disinterested".

Q. But the term could be twisted around. You didn't mean a sham authority, did you?

A. Not at all. I meant an authority whose lack of prejudice was obvious.

Q. I think you said that you had no contact with either Mr. Dorsey or Mr. Brown about the Clarke article beyond your initial suggestion to Colonel Brown at a conference in Washington in late December 1925.

648a VERNON M. DORSEY, a respondent herein, having been duly sworn, testified as follows:

DIRECT EXAMINATION

The WITNESS. May it please the Court, some time since I filed a printed pamphlet, seven copies of it, and that printed pamphlet did not have the jurat on my oath. I have now a printed copy with the jurat on my oath that I ask you to use as the official copy.

The CHAIRMAN. Is that in evidence?

The WITNESS. I would like to put it in evidence, your Honor. I think probably we would save time if we would consider that as merely read into this record, and then I would like to add a few more words.

(Affidavit of Dorsey, October 27, 1944, was thereupon received in evidence as Exhibit D-72.)

The WITNESS. The statements contained in the affidavit, the pamphlet, I have filed are true and correct. In addition, the following matters have been brought up during this hearing which were not considered in the affidavit, and I would like briefly to comment on them.

I never told Mr. Hatch that I wanted the Clarke article for filing in the Patent Office. I did not suggest to Hatch the writing of the Clark article. I never suggested to Hatch what was to be contained in the article. I don't remember ever discussing the article with Hatch prior to its publication, and I never saw the Carter letter that he said he thinks I saw.

649a I am ready for cross-examination.

The CHAIRMAN. You refer to the letter from Mr. Carter to Mr. Boshart?

The WITNESS. Yes, sir; he said I had seen it, I think.

Your Honor, in this Exhibit D-72, I would like to offer as a separate exhibit what is Exhibit A attached hereto, which is a correct copy of my testimony given in Toledo, as Exhibit 72-A. I would also like to offer my Exhibit B in this printed copy, which is a correct copy of the affidavit found in the Hazel-Atlas-Hartford record before the Supreme Court, as Exhibit 72-B; and I would like to offer another exhibit, a letter dated May 20, 1926, printed in this pamphlet, which has been identified by Mr. Hatch as having been mailed by him to me, as Exhibit 72-C.

(The documents just referred to were received in evidence as Exhibits D-72-A, D-72-B and D-72-C.)

The WITNESS. I am ready for cross-examination.

The CHAIRMAN. In order not to inconvenience Mr. Clarke—I understand he is anxious to catch a train, and I would like to ask him one question—can we put him on now?

Mr. DORSEY. Yes.

652a VERNON M. DORSEY, previously sworn, resumed his testimony.

Cross examination by Mr. BROWN:

Q. Mr. Dorsey, do you agree that any and all letters or telegrams contained in the record of the Supreme Court in this case which purport to have been sent by you or received by you may be included in evidence in this case?

A. Mr. Brown, so far as I know, there are none.

Q. Well, if there are?

A. I would like to know what they are. Remember, I haven't gone through that record with that in view. So far as I know there is only one paper that relates to me, and that is an affidavit that is entered on the index which I copied.

Q. I am not just sure what the letters are, and I had hoped you would accept that.

A. I don't know what they are, and I don't think there are any at all. You made me think I had overlooked something.

Q. No; it is a blanket thing that I have done with respect to all the others.

A. That is all I think that is in there.

Q. You don't know of anything in there that refers to you except that one paper?

A. That is right.

Q. I notice that your statement that has been filed starts off with a letter and then is followed with an affidavit.

A. That is right.

Q. Do you state now that all of the statements made in the letter are to be regarded as if they were in the affidavit?

A. I certainly believed them true when I made them. I checked through it quickly, and I am willing to say yes, but I would like a reservation on that. But I don't think there is anything in that letter that is not true.

Q. Then, we may use that in connection with your examination.

A. I wish you would. Then you will call my attention to anything that is not true.

Q. In this Exhibit B, beginning at page 91, there appears to be reproduced an affidavit executed by you on the 28th of November 1941. Did you execute such an affidavit?

654a A. That affidavit is printed in my pamphlet?

Q. The same affidavit is printed in your affidavit.

A. Yes, sir.

Q. Now, I am going to read two or three paragraphs of that and ask you if you still stand by them as being true and correct?

A. Yes.

Q. Beginning at the top of the page, I read:

"I represented the Hartford-Empire Company in the Patent Office proceedings relating to a certain application of Karl E. Peiler, Serial No. 294,792, filed May 5, 1919, which resulted in Patent No. 1,655,391, dated January 5, 1928, and involved in both of the above-entitled suits.

"Some time in the spring or early summer of 1926, Mr. Roswell F. Hatch of the Hartford-Empire Company furnished me with a copy of a manuscript for an article entitled 'Introduction of Automatic Glassworking Machinery; how received by Organized Labor', which was later published in the National Glass Budget for July 17, 1926 under the signature of William P. Clarke. I read the said manuscript and made some slight suggestions as to its verbiage. From my personal acquaintance with the glass feeding art extending from 1906 to 1926, I knew from my own knowledge that the statements in the said manuscript, and in the said article as published, were true in every substantial respect."

A. No; wait a minute, Mr. Brown, I think it would simplify matters if I commented as we went along. The article which this affidavit states Mr. Hatch furnished me in the spring or summer was the article which in my present testimony here I have said

655a was received while I was abroad, and it was on my desk when I got back in the early part of April. I modify my affidavit, Exhibit B, to that extent.

Q. What is the effect of the change, if any?

A. I don't know what the effect of the change is, Mr. Brown, except that that manuscript that I got from Hatch in March or April is not the same as the printed article. It is the earliest draft of it.

Q. That is your present testimony?

A. That is my present information derived from the facts that have been brought out here and in Toledo. I want to tell the Court here this affidavit, Exhibit B, was prepared the day after I testified in Toledo as to the Clarke article. I had been on the stand for two weeks. The whole Hatch situation was thrown in my lap without any preliminary direct, or any study of it, and I was called upon to throw my mind back for some 18 years to an event that had made no great impression on me 18 years before. I answered to the best of my ability, and I don't think I was very far off from the facts in my testimony.

Q. For what purpose was that affidavit executed?

A. Why, it was used, Mr. Brown, in the Hazel-Atlas suit. I was not counsel in that case, and therefore I don't know what purpose it was used for. It was simply a transcript in affidavit form of my testimony given the day before.

Q. Is it fair to say at the time you executed this affidavit you believed it to be true and correct?

A. That is correct. I would not have stated it that way unless I thought so.

Q. Reading the next paragraph:

656a "In connection with the proceedings in the Patent Office relating to the above-identified Peiler application, on which the patent in suit No. 1,655,391 was issued, I desired to present to the Patent Office the true facts in respect to the revolution which, as I then knew, had been accomplished in the glass-feeding art by the introduction of what is known as 'gob feeding', that is the system of feeding molten glass in which mold charges are produced in suspension and severed while in suspension to drop into the molds."

A. All right, hold it there. That is correct.

Q. "When the manuscript for the 'Clarke article' was presented to me, I found therein a true statement of such facts as I desired to present to the Patent Office." Is that true?

A. That is correct.

Q. And whether it was the first draft or the second draft you approved it at that time?

A. I approved the first draft. I don't think I approved anything else. The article was published, and after it was published I checked through it and found it substantially true and thought it was useful to put in the Patent Office.

Q. To go on with the paragraph:

"At my request a copy of the National Glass Budget containing said article, authenticated by an affidavit of the publisher, was obtained and filed in the record of the above-identified Peiler application."

A. There was such an affidavit filed, and I guess it was obtained at my request.

Q. You say it was?

A. I say it was, but I wonder if Mr. Brown thought of getting the authentication. I am a little hazy on that.

Q. And I am a little hazy when I read your statement in the affidavit and then you say you guess.

657a A. Mr. Brown, it is a matter of small moment. I think I did it at that time, and then Mr. Brown says he thinks he did it. I am not sure who suggested it. Mr. Brown got a copy, I know that. I am perfectly willing to assume any responsibility for wrongdoing in getting that certified copy.

Q. Wouldn't you say that this transaction was probably clearer in your mind in 1941 than it is today?

A. No; I wouldn't. I had been on the stand for two weeks, suddenly had the Hatch article thrown at me without any chance of reflection, without a chance of looking up anything, or studying it, and I would say my testimony today is 100 per cent better and clearer than it was in 1941 for that reason.

Q. Proceeding with the next paragraph:

"If the said 'Clarke article' had not then been published and available to be presented to the Patent Office, as such, and if I had known that Mr. Clarke had knowledge of the facts as stated in that article and that he was willing to make an affidavit to such facts, I should have prepared such an affidavit for Mr. Clarke's signature and would have asked him to execute it. However, since the published article was available, I submitted it as published and I expected that if the Patent Office Examiner was not satisfied as to the correctness of the statements in the article he would call for a verification thereof." That is right?

A. Well, that is a mixed-up question of statement of facts and what I would have done. I am perfectly willing to agree if I thought Mr. Clarke was available and willing to execute an affidavit, I would have put it in by affidavit form. I would have preferred it that way.

658a Q. Now, as a matter of fact, Mr. Dorsey, you knew didn't you, before the Clarke article was published that it was being prepared?

A. I knew before the Clarke article was published that Mr. Hatch had prepared an article. I also was informed by Mr. Hatch that that article might—the article that was published—might not be at all like the thing he had prepared, but might be entirely different.

Q. Do you mean to tell the Board now that you did not know what was in the Clarke article until you saw the published article?

A. I certainly do.

Q. That is your testimony?

A. Yes, sir. I had no copy of it as published before it was published.

Q. Didn't you remember when you saw the article that you had passed on the manuscript submitted to you by Hatch, having the same title and referring to the same subject matter?

A. I didn't say he did. It must be noted that the Clarke article, the manuscript as sent me by Hatch, was not something I had urged or wanted. I had wanted an affidavit from Mr. Carter on a certain line. Instead of that I got back from Europe and I found in a pile of papers on my desk an article by Hatch. He didn't say what he was going to do with it. I read it over most casually, changed two words, purely a verbal change, and sent it back without a comment. It made no impression on my mind whatever as to its contents.

Q. What does this sentence on page 92 of your affidavit, Exhibit B, mean, then:

“When the manuscript of the Clarke article was presented
659a to me, I found therein a true statement of such facts as I desired to present to the Patent Office.”

A. It was a true statement of facts, but it was not the article that I wanted. Remember, Mr. Hatch had sent me the early manuscript. I saw things that might be good in it. I was going to file the Clarke article or any article that was published if it was good, but I didn't know what was going to be published.

Q. Do you wish now to retract your statements in this affidavit?

A. I don't think I need to retract it. It was a true statement of facts which would be advisable to use in the Patent Office.

Q. Well, we may be talking at cross purposes, but as I understand this affidavit, it says that you recognized in the Hatch manuscript that it contained statements of such facts as “I desire to present to the Patent Office”?

A. That is correct, it did contain statements of facts that I wanted to present to the Patent Office.

Q. Well, didn't the Clarke article, as published, contain those statements of facts?

A. I don't remember how closely it followed the original draft that I saw. If the article was satisfactory as published, it was my personal intention to file it in the Patent Office.

Q. Mr. Dorsey, that Peiler application we are talking about was one of the most important that your company ever had, wasn't it?

A. What company? It was important for the Hartford Company, but it was not the only important case in my office, Mr. Brown.

Q. Do you mean to tell this Board now that you read and 660a checked the Hatch manuscript and then just a few months later, in the same year, saw the article that had been published and didn't recognize that it was the manuscript that you had passed on?

A. I doubt, Mr. Brown, whether—you say a few months. That was the interval of publication—the interval between publication and the date of my receipt of the article—no; three months. I saw the article in the early part of April. It was nearly three months before it was published.

Q. It was published in July, wasn't it?

A. Three months. I doubt whether I read that article attentively until immediately before we filed it in the Patent Office.

Q. Your testimony, as I understand it, to this Board is that when you filed the Clarke article in the Patent Office, you connected it in no way whatever with the Hatch article?

A. Oh, it was connected. It was certainly connected. The Clarke article certainly had the basis of the manuscript that Hatch had sent me. There is no question about that in my mind. How close they were, I don't know.

Q. You made no effort to find out how closely—

A. No; I didn't think it necessary. I couldn't see any reason for going in and finding out, and digging into a perfectly open thing, when the man had published it under his own name.

Q. Didn't you know that the article that was published in the name of William P. Clarke as author was, in fact, prepared by Hatch at the time you filed it in the Patent Office?

A. I didn't know that the article that was published by William P. Clarke was identically the same or, in substance, as the 661a manuscript I had received from Hatch. On the contrary, Exhibit C, this letter from Hatch gave me fair notice that the article might be materially changed. There was no reason for my going in and chasing it up. I wouldn't have minded putting it in under affidavit if I had gotten it the other way.

Q. Don't you think, assuming that the Clarke article was prepared by Mr. Hatch—

A. Yes.

Q. And without any material change in it by Mr. Clarke, don't you think in fairness to the Patent Office, when you put it in to prove something to the Patent Office as a benefit to you in prosecuting an application, that you owed it to the Patent Office to make aware to them the connection of your company with the preparation of that article?

A. Mr. Brown, the Patent Office was not concerned as to the literary merit and praise that was to be given to the author of that article. It just isn't investigating a Shakespearian-Bacon controversy of origin. It was engaged in getting authoritative statements, and when Mr. Clarke, a well-known authority, gave authenticity, authority to that statement by his name, I think that is the right man to have it go under. He was as much the author of the Clarke article, even if it was a dead copy, as we call Napoleon the author of the "Code Napoleon." It was Clarke's name that gave it its status. I don't see where the Office was deceived one bit.

Q. You presented it to the Patent Office and argued it to the Patent Office as being the article of a disinterested—

A. Of a what?

Q. Of a disinterested person, did you not?

A. It was—certainly I did, and I think Clarke was dis-
662a interested, and I think it was his article, that is all. It is just a question of whose article it is; what constitutes an author.

Q. Do you think it was effective, the weight of that article, or would have been effective in the Patent Office if it had been made clear to them that the article had been prepared substantially entirely by Mr. Hatch of the Hartford-Empire Company?

A. I will answer you this way: I think an affidavit to the contents of that article by Mr. Hatch would have had much less weight than when that affidavit was executed by Mr. Clarke. Certainly the man's name behind it means a lot, and Clarke's name was behind it. It seems to me it don't make any difference who did the actual writing as long as Clarke accepted it. Remember, I am not conceding now that I knew it was entirely Hatch's article. That I did not know.

Q. Had you known that it was entirely Hatch's article and that Clarke had merely signed it or sponsored it, would you have felt that you were acting fair with the Patent Office to file it as an article written by Clarke?

A. I wouldn't even have considered whether it was fair or not. I would have gotten an affidavit from Clarke, if Clarke was willing to accept the authorship, if I thought he was amenable to reason.

Q. Then, had you known the actual facts as have been developed in this hearing, if I understand you right, you would have felt it your duty to file an affidavit?

A. No, Mr. Brown. Let us consider—I would have preferred the other way. There were two courses that might have been open under these conditions. I could have filed the article under

Clarke's name and with an affidavit which would have had
663a much more force and effect in the Patent Office than the course I pursued in not putting an affidavit in. If any deception was to be put on the Patent Office it would have been intensified by the affidavit form, and that would have been a perfectly safe—even you couldn't have questioned the propriety of that, if I put it in under an affidavit. Why should I adopt the less forceful and more dangerous way when I had a more forceful and perfectly safe way? Gentlemen, to my mind, that is conclusive that I was perfectly innocent in the thing.

Q. I am going to digress for just a minute. You said that the manuscript you considered was not the manuscript that was actually published?

A. My understanding is it was the first draft.

Q. Now, may I refresh your recollection on that from Exhibit C, which is the letter of May 20, 1926?

A. Yes.

Q. From Mr. Hatch to you?

A. Yes.

Q. In which he says, "You flatter me again by wiring for a copy of the so-called 'Maloney' article. I enclose one of the original drafts which I made and you will understand Mr. Maloney will never appear in connection with this article in any way."

Then down below he tells that Maloney refused to sign it.

"As a result of this, I went to see Mr. William P. Clarke, of Toledo, the President of the American Flint Glass Workers' Union. Mr. Clarke also swallowed the labor bait which I had prepared for him and said he would be glad to revise and publish the article over his own signature if I would get assurance for him that the Owens Company would not be offended."

664a A. Will you read the rest of the letter? I don't think it is quite fair to stop there.

Q. "Of course, I knew unofficially that there would be no offense and I finally arranged with Mr. Carter to have Mr. McNerney give my draft to Clarke, which will probably put his mind at rest, as McNerney is Assistant Secretary of the Owens Company and a Director of the American Bank, of which Clarke is President."

Don't you recall Mr. Clarke and Mr. Hatch in this case in this hearing, having testified that the draft which was submitted to

Clarke and which, according to this letter, had been submitted prior to the date of this letter, was the draft that was published?

A. Wait a minute. I didn't know that they were going to testify at this hearing. He said the draft he submitted to Maloney was one of his original drafts. He also says in that letter, Exhibit C, "Clarke said he would rewrite the article to a considerable extent." I certainly had a right to accept that statement from Hatch as much as anything else.

Q. You have been here through the testimony; haven't you?

A. Yes; I have been here.

Q. Don't you know from that testimony that the paper that was submitted to Maloney, the draft, was the same draft that was submitted to Clarke?

A. I didn't know it then, and you are inquiring as to my state of mind and honesty in 1926, not to anything based on knowledge today.

Q. I am attempting to show you are wrong in saying you did not see the same draft of the Clarke article that was published.

A. Well, perhaps I did not. I don't think I did. He 663a said that was one of his original drafts. I don't know the changes that took place. I haven't followed it.

Q. Didn't you read that letter sending you the draft he was sending to Maloney?

A. He said that was one of the original drafts. Was that before or after Carter got hold of it? I don't know. I had no knowledge of the history in there at all. I never talked to Carter; I never had any conversation with Hatch; I never talked to Clarke. My knowledge is based on that letter.

Q. This letter we are talking about now?

A. That letter Exhibit C here.

Q. And I come back to my question, doesn't that show the draft you got was the draft that was submitted to Maloney?

A. No; I don't think it does show. The letter itself don't show it, Mr. Brown.

Q. Have you any reason to think it was not the same draft?

A. I haven't any reason to form an opinion on it—perhaps.

Q. You don't care, do you?

A. Oh, I do care, but I am not going to conjecture on that opinion.

Q. It doesn't make any difference?

A. I don't think, as a question of imposing on the Office, it makes a particle of difference. It may have made a difference in the way I handled it.

Q. As a matter of fact, only one draft of the Clarke article has been produced in this hearing. Do you know that?

A. I don't know how many more there are, but they are not in my possession.

666a Q. No party in this case has made any point of there being other drafts?

A. I haven't seen any other.

Q. You have seen two drafts?

A. The only draft I remember seeing was the draft I received in March when I came back from Europe and made my corrections on it.

Q. What about this letter of May—

A. I don't remember that draft at all. It may have been one of those I received in March.

Q. You remember this letter from Mr. Hatch?

A. I remember receiving such a letter.

Q. You have printed it as part of your affidavit?

A. Yes.

Q. You wired for a copy of the draft?

A. All right, because I had returned to Mr. Hatch the draft I had received in March. It went back to him. I didn't have anything. I was getting ready to amend the Peiler case, and I wanted to know what good I could gather out of the facts stated in that article.

Q. That is the reason you wired for this draft?

A. That is what I wanted it for, no doubt, because the case was up for amendment and writing new claims.

Q. So don't you remember he sent you a draft with that letter?

A. I don't remember his sending a draft, but he says he did in the letter, and I presume he did.

Q. Do you remember any difference between the draft or drafts you saw and the article as published?

A. I don't remember anything much about the original draft. That is my trouble. There are two things I remember. It is a funny thing, there is in this exhibit, HE-5152—

667a Mr. GOODRICH. That is Exhibit HB-1 in this case.

The WITNESS. I have seen a draft lately—I don't know where it is now—in which, in lieu of that first line "An apparent conflict," it read "of necessity." I can see my pencil correction, changing it to "an apparent" instead of "necessity," so that fixes that this draft is not the one I saw. Then, later on, there is a line, the sixth line on the page, where you see something drawn through that, and in that mass of notes drawn out, are the words "technique" or "manipulation," I have forgotten which, which I underlined in the original draft. Those were my corrections to Hatch's original draft.

Q. Mr. Dorsey, when did you first learn that the article that was published under the name of Clarke was, in fact, in principal substance at least, prepared by Hatch?

A. I heard some time, I suppose, in 1934 that there was some kind of talk about irregularity in the preparation of the Clarke article. I never knew any details whatever of that until the Toledo trial.

Q. And you want to say to this Board under oath not until 1941—I think it was.

A. 1941.

Q. Did you know the real facts about the preparation of that article?

A. Gentlemen of the Board, that is exactly what I am saying. There is no question about it. I do not hesitate to say it. I had no reason to know.

Q. After the Hazel-Atlas decision in 1932 there was a considerable amount of correspondence about the authenticity of this 668a article between counsel for Shawkee Company and counsel for Hartford-Empire Company. Do you know about that correspondence?

A. No; I do not. I was not on that.

Q. You were counsel in that case?

A. What case.

Q. The Shawkee case.

A. I was counsel in the original trial of Hartford v. Shawkee. I had dropped out of it.

Q. You were counsel in that case in the Court of Appeals, too?

A. Of course, it went up, but I was not in the case at any time when the charge of irregularity was made, as I remember. If I was, not brought to my attention.

Q. I am talking about the original case, too. I am going back to the Shawkee case.

A. Remember, I was on the brief, but I did not argue the case. I dropped out of the case very much, and I was not in contact with what the others were doing. I want to impress that I was not engaged in the case after the first hearing.

Q. You certainly were of counsel in the case, according to the Federal reports.

A. You mean when it went up the first time.

Q. I mean in the trial court and in the 3rd Circuit Court of Appeals.

A. I was on the brief; surely.

Q. Now, immediately after that case was decided by the 3rd Circuit Court of Appeals, there was a series of letters exchanged between Judge Buffington, Otto Barnett and Judge Haight?

A. Yes.

669a Q. In which the authenticity of this Clarke article was questioned. Are you familiar with that correspondence?

A. I don't think there was any definite charge made there. There was a general charge of "smear" but I don't remember the facts were ever set out. I never knew the facts, at least.

Q. Wasn't that correspondence ever called to your attention at that time?

A. It probably was, but I don't think it was ever said that the article was written by Hatch, was it? At that time, now, Mr. Brown. It was later on, I know, but at that time I think it was more of a general smear, is my recollection. I didn't know the facts. I couldn't have ascertained the facts if a charge had been made.

Q. Did you confer with Judge Haight about this matter?

A. I did not.

Q. Did you confer with Robson D. Brown about it?

A. I did not. They handled that.

Q. And your position is, although you were of counsel in the case, you knew nothing about that?

A. That is correct. If it did happen when I was counsel.

Q. All right, let us take another topic. When the Hazel-Atlas decision came down on May 5th, 1932—

A. Yes.

Q. You, of course, saw that?

A. I saw that decision.

Q. And you saw what Judge Buffington had done in the way of relying on the Clarke article?

A. I did.

Mr. GOODRICH. I object to the word "relying."

By Mr. BROWN:

670a Q. Is it your statement to this Court that even at that time you did not know that article was prepared by Hatch and not L. J. Clarke?

A. I knew no more in 1932 as to the preparation of the Hatch article than I did in 1926. I didn't know as much, because it was such a normal thing, filing it in the Office, that anything connected with it had passed out of my mind completely.

Q. In spite of the fact that you had seen two drafts, and in spite of the fact that in May you had wired for another copy?

A. No, no. At most I had seen one draft and had wired for another copy. Don't make it two drafts, and wired for another one.

Q. I don't want to misstate it, but the first sentence of that letter of Hatch to you is "You flatter me again by wiring for a copy of the so-called 'Maloney' article."

A. Well, perhaps I had wired before and gotten it. I don't know. I certainly only saw two drafts.

Q. Your testimony is now you had completely forgotten having seen, and had completely forgotten the substance of what you call the Maloney article, when you filed the Clarke article in the Patent Office?

A. Mr. Brown, I don't like the word "substance." Make it contents. I knew the thing was directed to the same general line. That is substance; perhaps, but whether the treatment was the same had entirely escaped me.

Q. Did you regard the substance—I believe that is your word—or contents, whichever you prefer, of the Clarke article as being material and relevant to any question that was properly before the examiner in connection with this Peiler application?

671a A. I certainly so regarded it when I filed the Clarke article with the examiner. I wouldn't have filed it unless I thought it was.

Q. Did you regard the statements therein referring to gob feeding as referring to gob feeding by the apparatus and methods described in the Peiler application?

A. I regarded it, yes, in one way, in that it referred to our apparatus, but that we were claiming so broadly that all this gob feeding—all these gob feeding devices mentioned there would fall within the claims. I can't give you a direct yes or no answer to that, because I have to qualify it that way. I regarded it as a general discussion of gob feeding, and I also knew that our claims were so broad that they would probably overlap and cover all these gob feeders mentioned.

Q. Did you mean to argue to the Patent Office that the Clarke article justified the argument that the Peiler invention of that application had revolutionized the art?

A. I intended to use it, and I did use it to show that gob feeding was a very great advance in the art. Now, who was entitled to the broad claims on gob feeding is not discussed in that article. That was what was before the Board.

Q. Didn't you use that article as indicating the revolutionary advance that had been made by Peiler?

A. I think the revolutionary advance was made by gob feeding, yes, and we were the only applicant before the Patent Office with these claims, and I presume it necessarily followed that that innuendo was that it was made by Peiler. We had gone through a good many interferences leading up to that conclusion.

Q. Knowing what you know, do you think it was fair to the Patent Office to argue that this Clarke article was, in fact, the testimony of a reluctant witness?

672a A. Did I have any reason to think he was—wait a minute. Did I say the Clarke article was the testimony of a reluctant witness? I think Mr. Brown explained the other day that by reluctant witness we were talking about the Union leaders whose men were being displaced by the machine. I don't think that there is any statement that Mr. Clarke, per se, was a reluctant witness, and I don't see why I should think he was anything like a reluctant witness. He certainly didn't have anything to gain, so far as I knew.

Q. Since you are more or less demonstrating your fairness and honesty to the Patent Office—

A. Thank you.

Q. By your testimony, I would like to read what you did say to the Board.

A. Yes, sir.

Mr. GOODRICH. It has been read into the record, I believe.

By Mr. BROWN:

Q. It is on page 477 of Exhibit E. What I refer reads as follows:

"The commercial success in the instant case is the more conclusive of invention because glass feeders are not sold by publicity and advertising. The market for them is with hard-headed manufacturers whose balance sheets establish success or failure."

A. That is no argument for any one case. That is pretty general.

Q. "That the appellant's feeders have been a tremendous success and have revolutionized the art from the standpoint of economy is recognized by reluctant witnesses. We call attention to the article by William P. Clarke, President of the Flint Glass

673a Workers' Union (a union whose members have been displaced by the feeders in question) and published in the National Glass Budget for July 17, 1926, which is an exhibit in this case. Clarke in the exhibit in question gives a graph showing the rapid acceptance of suspended-charge feeders which he terms "gob feeders" and stresses the great displacement of manual workers occasioned thereby."

A. Yes.

Q. Didn't you mean to argue thereby that Clarke there was testifying to the advance made by the Peiler invention?

A. Clarke was testifying to the advantages of gob feeders and as our claims covered gob feeders, there was certainly an advance made by this invention. I think that was the line. There is nothing in the Clarke article that would indicate Peiler was the broad inventor.

Q. No; but you argued that article to the Patent Office to establish primary inventorship of Peiler?

A. No; but as to the advantages of gob feeding, and we based prior inventorship of Peiler on his own date and the fact there was no other contestant for that honor. I didn't argue he mentioned Peiler at all. He didn't.

Q. When you were using that particular article for supporting your argument for invention of Peiler, why did you reprint it as an appendix to your brief, and why did you italicize the portions referring to gob feeding?

A. The reason is clear—I will give you a little of the status of that exhibit. The first Peiler gob feeder that I saw and the first one in commercial operation was in 1916. That chart showed the commencement of the encroachment of the gob feeders in 1917.

To my mind that article was of value, taken in connection with the proven dates of Peiler's work, as showing the incidence of the curve of the gob feeder invention, that Peiler's invention was then coming into use.

Q. Wouldn't you say that Judge Buffington accepted that article as establishing the pioneer character of the—

A. I am not going to interpret Judge Buffington's decision any more than you are. It was not urged on him in that light.

Q. Ordinarily I would agree with you, but as I understand in these disbarment proceedings you are under the necessity of ignoring certain rules of strict evidence, and of laying your conduct out before the Courts so that they can judge your conduct. I am asking you, as a matter of fact, when you read that decision, or when you read it now, don't you agree that Judge Buffington did rely upon this Clarke article as establishing pioneer invention for the Peiler patent?

A. I would have to consider the Court decision. I have never looked at it in that light. He may have done it, I don't know.

Q. If he did, and if you had known of the actual genesis and origin of this article, namely, that it was prepared as a self-serving document by someone in the Hartford-Empire fold, would you have felt an obligation to disclose the truth about it to the courts?

A. Wait a minute, Mr. Brown. You are presuming now that the Clarke article itself did what Buffington says it did, and teaches that Peiler was the first inventor. Is that your thesis? Because it is rather involved here. I want to know whether Buffington was right in his assumption, or whether he was wrong in his assumption.

Mr. GOODRICH. Or whether he made such an assumption.
675a The WITNESS. It is going rather deep in that respect.

By Mr. BROWN:

Q. I am going to let you answer the question.

A. Read me the question.

(The preceding question was read.)

The WITNESS. The question involves, then, the fact that the article did teach that Peiler was the first inventor. There was no more reason why that article should not be filed under Clarke's name, if it taught that, than it should be put under it if it merely said that the gob feeder was a big advance. It is not the substance of the article that makes the filing right or wrong. It is the authority of the authorship behind it.

By Mr. BROWN:

Q. Then, don't you think the authorship behind the article is material, and very material?

A. What is authorship, Mr. Brown? That which gives authority, under the Century definition. You are trying to hang your case on Webster. Without looking in the dictionary—

Q. Do you now mean to say that your position before this Court is that Clarke was the author of that article?

A. I would be willing to rest my case on the fact that Clarke was the author of that article when you consider it in the light of what the article was. He was the man whose experience gave it authority, and to my mind he was probably the author under the dictionary definition.

Q. I have just one or two more questions. As a test of 676a your sense of professional obligations and duty to the Patent Office, you still think it would be fair to have an article prepared by an employee of your company, and then have it signed by somebody who did no more than make minor revisions in it, that person being a person who could give weight to the article, and then to file it in the Patent Office without disclosing the connection of your company in its preparation?

A. If that man was a reputable person whose name would carry weight, and the article submitted by the employee of my company was so perfect that it could not be bettered by the expert, I don't see any reason why I should not have filed it.

Q. I am going to ask one more question. If you wanted to put before the Patent Office a background article—

A. Yes.

Q. And it related, say, to electricity, and had an article written by Steinmetz, and an article written by Jo. Brown—

A. Yes.

Q. Do you think they would be of equal weight, those two articles, if the subject matter were the same? Would they be of equal weight in the Patent Office?

A. No. You have to consider the mentality of the two men. They would not have the same weight. I concede that when you as a lawyer put your name on a brief, I think you are the author of the brief. I don't inquire whether it was written by somebody

in your office. I think you have to make a distinction between literary authorship of an article and authoritative authorship. I have seen many decisions from these gentlemen sitting up here, and I would hesitate to take an oath that every word in 677a those decisions was written by them, but nevertheless they are considered the authors of them.

Q. I am going to ask just one more question. Would you agree that where an article is in the nature of a historical article—

A. Yes.

Q. Consisting of compilations and selections of material, that the question of the person that did the work on that is of great materiality in giving weight to the value of that historical article?

A. That is correct.

Q. That is all.

A. I want to add to that, because the interpretation of historical data always calls for a person who is accustomed to weigh it and know what it means, and Mr. Clarke, I think, could interpret that.

By Mr. GOODRICH:

Q. How did you gain your knowledge of the glass business which you mentioned in your affidavit?

A. Well, I started with Corning Glass Works in 1898. In 1912 I saw a gob feeder operated in the Corning factory, and from 1912 to 1925 I was right in the thick of the feeder fights and interferences and knew pretty well what was going on among the different manufacturers.

Q. Were you an attorney also for the Empire Machine?

A. I was.

Q. What did it make?

A. It made bulb-blowing machines, and they invented a feeder. They were a branch of Corning, and they tried that feeder out in Corning and we got into interference with one of the Hartford applications. That is where I got in touch with Hartford.

678a Q. You have been patent counsel for Corning for 40 years or more?

A. Yes.

Q. And you have been patent counsel for Hartford in some cases from 1916 on up?

A. That is right.

Q. Did I understand you to say that the Clarke article bore on any claimed innovation in the Peiler application?

A. It doesn't by name, but—

Q. It is a general discussion of the impact of automatic machinery—

A. And of gob feeding, and if the Peiler claims are directed generally to gob feeding, it certainly bears on the patentability of the Peiler claim.

Q. On any particular claim?

A. Well, it would depend on the claim. I wouldn't want to go into that, but it doesn't name Peiler.

Q. Peiler made that, though.

A. Peiler did show to the Patent Office he was the inventor of gob feeding, and if my memory is correct, he showed a photograph of the first gob feeder ever run, long before these other people ever came into the field.

Mr. GOODRICH. Nothing further from me.

By Mr. HENRY:

Q. Mr. Dorsey, I would like to ask you some questions. Was this letter dated May 20, 1926 addressed to you by Mr. Hatch, Exhibit C in your affidavit, sufficient to apprise you that Mr. Clarke would sign an article, this article that you had previously seen, and prepared by Hatch, possibly with amendments?

A. I think it apprised me, Mr. Henry, that Clarke would sign an article on this general subject, the contents of which he agreed with. Does that answer the question?

Q. Yes, sir.

A. I am guarding myself a little on that.

Mr. HENRY. That is all.

754a

Respondents' Exhibit C-70-4

(Ex. 4 to Carter affidavit of 11/20/44, Respondents' Exhibit C-70)

APRIL 19, 1926.

HENRY W. CARTER, Esq.,

Owens Bottle Co., Toledo, O.

DEAR MR. CARTER: I received this morning your letter relating to my proposed article on "Feeding." I appreciate your comments very much indeed and I think there is but one point on which you failed to appreciate my exact position. That is, I prepared this article so far as possible with reference only to the proceedings of The Bottle Blowers Association, and knowingly and intentionally I reproduced some of the errors found therein.

For example, in any statement as to the number of Owens machines in use, I have used the numbers given in the proceedings, even when I knew this was not correct. The point I have in mind is that if I can get the President of the Association to publish this I thought that he should base all of his statements on their printed records except where such statements had a direct bearing on the particular point which we wished to bring out.

I fully appreciate your remarks on the "Brooke Flow," but I thought it necessary to go into this because page after page of the

proceedings is taken up with the discussion of this device. In fact, it came close to causing as much discussion as did the Owens machine. Another reason for considering the Brooke Flow is the fact that the name which they have used throughout all of 755a their proceedings, even up to date, comes from the Brooke device. That is they call their feeders "Pouring" or "Flow" devices. As I recall it the expression "Gob Feeders" does not occur anywhere in the entire report.

I shall go over this again and I hope to be able to cut down on the space given to the Brookes Flow. In fact in view of your suggestion, I think I can make considerable improvement in the article and still base all statements on information published in the proceedings of The Glass Blowers Ass'n.

It is my present intention to revise the article in view of your comments and others which I expect to receive from Dr. Dorsey and then see what I can do with President Maloney. I feel sure that after such revision there will be nothing objectionable to you so that I need not hesitate in letting it appear in print, if I can make the necessary arrangement. Of course I think you understand that the whole object of the article is to make an excuse to get the production curves and a few statements in regard to gob feeding into print.

I certainly appreciate your comments and thank you for your kind assistance.

Very truly yours,

HARTFORD-EMPIRE COMPANY,
By _____

RFH:SBK

759a

Respondents' Exhibit D-72-C

(Ex. C to Dorsey affidavit of Nov. 6, 1944, Respondents' Exhibit D-72).

EXHIBIT C

MAY 20, 1926.

Mr. V. M. DORSEY,

635 F. Street NW., Washington, D. C.

DEAR MR. DORSEY: You flatter me again by wiring for a copy of the so-called "Maloney" article. I enclose one of the original drafts which I made and you will understand that Mr. Maloney will never appear in connection with this article in any way. Moreover, when the article appears in print, it will probably be changed considerably from the present form.

I do not know whether I told you that Mr. Maloney refused to publish the article over his name for fear of some unknown complication with some manufacturer with whom he may have to do

business. I cannot see any possibility of any embarrassment to Mr. Maloney if he should publish the article, but I could not get that idea out of his head. Nevertheless, he said that he approved heartily of the article and would like to see it published. Moreover, he knew from his personal knowledge that every statement in it was accurate.

As a result of this, I went to see Mr. William P. Clarke, of Toledo, the President of the American Flint Glass Workers' Union. Mr. Clarke also swallowed the labor bait which I had 760a prepared for him and said he would be glad to revise and publish the article over his own signature if I would get assurance for him that the Owens Company would not be offended. Of course I knew unofficially that there would be no offense and I finally arranged with Mr. Carter to have McNerney give my draft to Clarke, which will probably put his mind at rest, as McNerney is Assistant Secretary of the Owens Company and a Director of the American Bank, of which Clarke is President.

It was quite amusing to hear Clarke imply that Maloney was a 'liar'. I explained to Clarke that that might be so but I had based my statements on printed publications which I accepted without question. Clarke said that he would rewrite the article to a considerable extent, I suspect, and publish it in the Trade Journals. I fear I may have to go out to Toledo again to get Clarke to show some speed in this matter and perhaps to supervise what he publishes. I think he understood just what we want published, but he might unintentionally destroy some of the propaganda which we planned.

I will see that you get a copy of some Journal in which this article appears when it comes out.

Incidentally, when I was feeling rather discouraged on getting the labor article published, I had the idea of getting Jack Arbogast to write a history of his father's connection with the glass business. I am told that Jack is more or less of a loafer but would be interested in any small sum he could pick up. I think that we could introduce the matter in which we are interested in such a history and I was quite amused to think such a history would of necessity be strongly anti-labor. In view of the 761a nice labor article I had just prepared, I should hate to see both of these articles (should the second one be published) appear over my name, because my union friends would certainly be very sore.

Very truly yours,

HARTFORD-EMPIRE COMPANY,
By _____

RFH/T.
Enclosure.

815a

Respondents' Exhibit HB-61

PART OF DEPARTMENT'S EXHIBIT E

Department of Commerce

United States Patent Office

To all persons to whom these presents shall come, Greeting:

This is to certify that the annexed is a true copy from the records of this office of Letter to Office, Affidavit of Thomas A. Kimes and Front Cover Page of "National Glass Budget," being an Exhibit, forming part of Paper 56, filed October 11, 1916, in the matter of the

Letters Patent of Karl E. Peiler, Assignor, by Mesne Assignments, to Hartford-Empire Company, Number 1,655,391, Granted January 3, 1928 for Indorsement in Methods of and Apparatus for Feeding Molten Glass

In testimony whereof I have hereunto set my hand and caused the seal of the Patent Office to be fixed, at the City of Washington, this tenth day of October, in the year of our Lord one thousand nine hundred and thirty-three and of the Independence of the United States of America the one hundred and fifty-eighth.

Attest:

D. E. WILSON,
Chief of Division.

CONROY P. COX,
Commissioner of Patents.

816a

IN THE UNITED STATES PATENT OFFICE

Application of Karl E. Peiler, Serial No. 294,792, Filed May 5, 1919, Method of and Apparatus for Feeding Molten Glass

Div. 15, Room 329.

HONORABLE COMMISSIONER OF PATENTS, *Washington, D. C.*

SIR: Supplementing the amendments already filed in this application, since the last action by the Examiner, we transmit herewith a number of affidavits and exhibits intended to lay before the Patent Office certain material facts relating to the development of the type of glass feeders to which this application relates, as well as certain facts bearing upon the prior art references.

The rapid and widespread commercial adoption of suspended-charge glass feeders, particularly plunger feeders, is an interesting and remarkable story. It is outlined in the affidavit of the appli-

cant Peiler, which is filed herewith. This affidavit describes the commercial prior art as it existed when the applicant entered the field, outlines his own developments of commercial glass feeders, and the development of competitive feeders, gives a statement of the effect of this development on the glass industry, discusses the importance of the shaping of mold charges, particularly the shaping of the charges by the use of a reciprocating plunger, and gives examples of the recognition of the importance of these developments by technical writers in various parts of the world.

817a The affidavit also points out certain facts that are material to the interpretation of the principal prior art references on which the Examiner is understood to have relied in rejecting the claims of this case.

Because of the applicant's intimate knowledge of the many matters involved, his affidavit has been made more extensive than would ordinarily be appropriate. However, if corroboration of any of the applicant's statements is desired by the Patent Office, such corroboration can be abundantly furnished by affidavits of others who are acquainted with the facts.

The affidavit of George E. Howard, a well-known glass engineer, describes his own independent development of commercial glass feeders, including his experiments with suction and pressure feeding during a time when he considered that the use of a plunger was not practical, and sets forth his later discovery that the plunger is entirely practical, so much so, that he used plungers in all of his commercial feeders. Mr. Howard also states certain facts, of his own knowledge, relating to the Rau patent No. 1,151,393 showing that the disclosure of that patent never operated, and was never intended to operate, as a suspended-charge feeder.

Also, Mr. Howard corroborates the statement of Mr. Peiler that the modern suspended-charge feeder requires colder and more viscous glass than was used in the prior stream-feeding method and in its various modifications. In this connection, attention is invited to the early application of Peiler filed March 10, 1914, Serial No. 823,694, on pages 2 and 3 of which is a clear discussion of this matter of employing colder glass instead of the hotter glass theretofore employed in mechanical feeders.

So important is this matter of viscous glass versus hot glass, that it is proper to divide all mechanical glass-discharging feeders into two groups, placing the modern suspended-charge feeders in the viscous-glass group and all prior mechanical glass-discharging feeders in the hot-glass group. It is also proper to say that, for this reason, the prior art devices of the references in this case belong to a nonanalogous branch of the glass-feeding art, as compared with the "viscous-glass" suspended-charge feeders to which this application relates.

The article published in the National Glass Budget for July 17, 1926, by William P. Clarke, President of the American Flint Glass Workers' Union, is an interesting account of the introduction of automatic glass machinery and its reception by the labor unions. It describes the various steps by which automatic machinery was introduced, the revolution in the art accomplished by the Owens machine, the somewhat temporary effect of flow-feeding devices, and the further revolution in the art produced by the suspended-charge feeders, referred to in the Clarke article as "gob feeders."

With reference to the flow-feeders or stream-feeders of the Brooke type, Mr. Clarke says on page 20 of the Budget, after describing the general operation of these feeders:

"This pouring device appeared to the bottle blowers to be an iron man which could be put to work delivering glass automatically to the semiautomatic machines then in use, to the elimination of all hand-gatherers but this proved to be a false alarm. Quite a number of these devices were introduced, starting about 1908, but they were used only in a few plants, and practically the entire production was on wide-mouth ware. Their production of ware of the

type made on the Owens machine was insignificant as compared with Owens production during the same period, and apparently these flow devices, at the time in question, that is 1911, did not cause consternation among the workmen to such an extent as had been produced by the first use of the Owens machine."

Then Mr. Clarke discusses the advent of the suspended-charge feeder, which was first brought to the attention of the union blowers in 1917. In referring to the principle of operation of the suspended-charge or gob feeder, Mr. Clarke says:

"Instead of employing a stream of glass collected in the mold until the desired mold charge had accumulated, these new feeders cut off a suspended chunk or gob of glass which was pre-formed during suspension to correspond, to some extent, at least, to the shape of the mold cavity in which it was to be received."

The Clarke article is accompanied by a chart showing the approximate production on Owens machines since 1905 and the approximate production of suspended-charge feeders since 1917. The curves shown on this chart are interesting as showing that the production on the Owens machines fell off at just about the time when the suspended-charge feeders got under way. In discussing this chart, Mr. Clarke says:

"In 1917, the gob feeders began to attract commercial attention. The production line on these feeders starts up rapidly as was the case with the Owens machine, but there is one very noticeable difference. The curve representing gob-feeding production up

steadily and instead of showing a decreased production, or
820a at least a failure to increase production, from year to year,
this line continues its upward climb to the present time."

Summarizing the discussion of feeders in this article, Mr. Clarke
says:

"Disregarding, for the present, the first use of machinery in making bottles, and considering only the sudden and alarming introduction of revolutionary devices, the Bottle Blowers' Association has twice been confronted with mechanism which superseded a large amount of hand labor at each time. These crises were, first, the Owens machine, second by gob feeders.

"At the present time, the bottle production of the country from automatic machinery is produced almost entirely by Owens machines and gob feeders and, as is shown on the chart, practically all of the annual increase in production is being made on gob feeders."

The affidavit of Harry L. Heintzelman, President of the Monongah Glass Company, states that he was financially interested and well acquainted with the development of the early Hartford-Fairmont paddle feeders, but that, in spite of his interest in the feeders, he and his associates in the Monongah Glass Company felt obliged to insist on a long trial of the feeder under full commercial conditions before they felt justified in adopting so revolutionary a machine.

The conclusion of the whole matter is, that the suspended-charge feeder has accomplished a revolution in the glass art, that it operates on principles not disclosed in the patents of the prior art, and that many of the features contributing to the success of the suspended-charge feeders are set forth in the claims of this
821a case. It is submitted, therefore, that these claims are entitled to favorable consideration, which is respectfully solicited.

Respectfully,

KARL E. PEILER,
By DORSEY COLE,
His associate attorney.

WASHINGTON, D. C., October 11, 1926.

AFFIDAVIT OF THOMAS A. KIMES

STATE OF PENNSYLVANIA,

County of Allegheny, ss:

Thomas A. Kimes, being duly sworn, deposes and says that he is the Secretary of the "National Glass Budget," and that the attached is a true and correct copy of the issue of said "National Glass Budget" for July 17, 1926.

T. A. KIMES.

Sworn and subscribed to before me this 8th day of October 1926.

[SEAL.] Paul A. Hughes, *Notary Public.*

[SEAL.] PAUL A. HUGHES, *Notary Public.*

My Commission Expires February 19, 1929.

Application of Karl E. Peiler, Serial No. 294,792, filed May 5, 1919.

Exhibit accompanying amendment dated October 11, 1926.

886a

Respondents' Exhibit D-72-A

(Ex. A to Dorsey affidavit of Nov. 6, 1944, Respondents' Exhibit D-72)

Testimony of Vernon M. Dorsey, Given in the District Court of the United States for the Northern District of Ohio, Western Division, in United States of America v. Hartford-Empire Company.

(Copied from the stenographic transcript of November 27, 1941.)

Cross-examination by Mr. SAMUEL ISSEKS, for the Government:

(Page 8112:)

"Q. Mr. Dorsey, you filed the so-called Clarke Article with the Patent Office in connection with the application of Karl E. Peiler, Serial No. 294,792, did you not?"

"A. I did.

"Q. Did you know before you filed it that the letter, which is Government's Exhibit 1278, that it was originally prepared by Mr. Hatch?"

"A. I knew that Mr. Hatch had made arrangements to have the Article prepared, but I don't know the details of who was the author. The article was sent to me for revision. I went through it and found it as I thought substantially correct, and I said okeh.

"Q. Did you know that Mr. Hatch prepared it in consultation with Mr. Carter, of Owens?"

"A. I don't think I did.

"Q. Did you see the correspondence between Mr. Brown and Mr. Carter, and Mr. Hatch and Mr. Carter?"

887a (Page 8113)

"A. You are referring to now, did I see it?"

"Q. At that time?"

"A. No; I did not.

"Q. Were you familiar with the fact Mr. Hatch first tried to get some other member of the Union to sponsor the article?"

"A. It seems to me I have some recollection Mr. Hatch tried to get someone else to write the article. I do not accept the word 'sponsor' because I did not know the way it was written.

"Q. It was contemporaneous correspondence at the time between Mr. Hatch and Mr. Carter about getting someone to 'father' the article?

"A. That did not go through my hands.

"Q. Did not come to your attention either?

"A. No.

"Q. Would you have countenanced the matter if you had known about it?

"A. I am inclined to think if it would have been brought to my attention I would say if this man is willing to write this article and swear to it I would have prepared the article in affidavit form and probably a good deal stronger, and got him to swear to it. That is about the way I would have done it."

(Page 8114:)

"Q. If you had known the Clarke Article was originally written by Mr. Hatch in collaboration with Mr. Carter would you have so apprised the Patent Office?

Mr. PARHAM. I object, Your Honor.

The COURT. He may answer.

888a "A. I don't know whether I would, Mr. Isseks. Ghost articles are quite common in this world, and I will tell you what I am inclined to think. If I would have prepared the thing I would have prepared it in affidavit form myself and put in what I wanted, and try to get the man to sign the affidavit.

(Page 8115:)

"Q. In any event, as far as you know the Patent Office was never apprised of the fact Mr. Hatch originally wrote that article?

"A. I think that is correct.

"Q. As far as you know, up to the decision of the Circuit Court of Appeals for the Third Circuit, I think that was May 6th, 1932, up to May 6th, 1932, the Circuit Court of Appeals was never told of the fact as far as you know?

"A. I am just trying to recall how that sequence of events happened there. It seems to me it was brought to the attention of the Third Circuit Court, I don't know when, but that was one of the appeals after the first decision.

"Q. I am talking about the first decision, which was May 6th, 1932?

"A. That is correct.

"Q. Up to that time it was not brought?

"A. No.

"Q. Thank you, sir.

"A. I don't want to limit myself to particular dates."

(Copied from R. 113:)

880a

Respondents' Exhibit D-72 B

(EX. B to Dorsey affidavit of Nov. 6, 1944, Respondents' Exhibit D-72)

AFFIDAVIT OF VERNON M. DORSEY

STATE OF OHIO,

County of Lucas, ss:

VERNON M. DORSEY, being duly sworn, deposes and says:

I am an Attorney at Law specializing in patent matters and am a member of the firm of Dorsey & Cole, National Press Building, Washington, D. C.

A large part of my practice of patent law has been in connection with glass feeding and other branches of the glass working art. Since 1906, I have been acquainted with the glass feeding art, including the methods and apparatus in actual commercial use and the methods and apparatus disclosed in issued patents.

I represented the Hartford-Empire Company in the Patent Office proceedings relating to a certain application of Karl E. Peiler, Serial No. 294792, filed May 5, 1919, which resulted in patent No. 1,655,391, dated January 3, 1928, and involved in both of the above-entitled suits.

Sometime in the spring or early summer of 1926, Mr. Roswell F. Hatch of the Hartford-Empire Company furnished me with a copy of a manuscript for an article entitled "Introduction of Automatic Glass Working Machinery; How Received by Organized Labor," which was later published in the National Glass Budget for July 17, 1926, under the signature of William P. Clarke. I read the said manuscript and made some slight suggestions as to its verbiage. From my personal acquaintance with the glass feeding art extending from 1906 to 1926, I knew from my own knowledge that the statement in the said manuscript, and in the said article as published, were true in every substantial respect.

In connection with the proceedings in the Patent Office relating to the above-identified Peiler application, on which the patent in suit No. 1,655,391 was issued, I desired to present to the Patent Office the true facts in respect to the revolution which as I then knew, had been accomplished in the glass feeding art by the introduction of what is known as "gob feeding," that is, the system of feeding molten glass in which mold charges are produced in suspension and severed while in suspension to drop into the molds. When the manuscript for the "Clarke Article" was presented to me, I found therein a true statement of such facts as I desired to present to the Patent Office. At my request, a copy of the National Glass Budget containing the said article, authenticated by

an affidavit of the publisher, was obtained and filed in the record of the above-identified Peiler application.

If the said "Clarke Article" had not then been published and available to be presented to the Patent Office, as such, and if I had known that Mr. Clarke had knowledge of the facts as stated in that article and that he was willing to make an affidavit to such facts, I should have prepared such an affidavit for Mr. Clarke's signature and would have asked him to execute it. However, since the published article was available, I submitted it as published and I expected that if the Patent Office Examiner was not satisfied as to the correctness of the statements in the article he would call for verification thereof.

VERNON M. DORSEY.

Sworn to and subscribed before me this 28th day of November 1941.

G. M. RESWICK,
Notary Public, Lucas County, Ohio.

932a

Respondents' Exhibit D-72

In the United States Patent Office
Before the Commissioner of Patents

IN THE MATTER OF THE RULE TO SHOW CAUSE ISSUED AGAINST
VERNON M. DORSEY

REPLY TO RULE, SUPPORTING AFFIDAVIT, AND EXHIBITS ON
BEHALF OF RESPONDENT

WASHINGTON, D. C., October 27, 1944.

The Honorable Commissioner of Patents, Washington, D. C.

SIR: I am in receipt of your letter of the 11th instant calling on me to show cause why I should not be disbarred from practice before the United States Patent Office.

I welcome the opportunity this affords me to present my case against what I regard as an unfounded charge arising out of an erroneous interpretation of my testimony, and here deny that I filed the Clarke article in the Peiler application knowing that Clarke was not the author thereof.

I note your reference to the decision in the case of Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U. S. 238; 64 S. Ct. 997. I presume that this is merely in the nature of a reference and does not in any way imply that such decision is binding on me or that it prevents me from making a defense before you under the provisions of Sec. 487 R. S. (U. S. C., title 35, sec. 11).

That no language of the Supreme Court in the case in question is binding on me or estops me from contesting the correctness thereof will be apparent when it is remembered that I was neither a party to such litigation nor of counsel therein.

Under these circumstances, while the decision in question is binding on Hartford-Empire it does not in any way estop me; for, as pointed out in *United States v. Throckmorton*, 98 U. S. 61-65 (quoting from *Welles on Res Adjudicata*), a stranger to a judgment is not bound.

It could be noted that the only reflection thrown on me by name is contained in the decision of the 3d Circuit Court of Appeals in 137 F. (2d) 766, from which I quote:

"It is unnecessary for present purposes to relate in detail how Hatch, aided and abetted by Brown and Dorsey as well as by H. W. Carter, of Owens Bottle Company, deliberately set about 'to get the production curve and a few statements in regard to gob feeding into print' (from a source ostensibly hostile to labor-saving glassblowing machinery) for use in the Patent Office, etc."

In reversing the decrees of the 3d Circuit Court of Appeals the Supreme Court found fraud, but this does not necessarily carry with it the complete adoption of the findings of the lower Court as to each individual named in the quotation. On the contrary, the Supreme Court narrated the occurrence in its own words and omitted individual names.

It is submitted that the finding of fact contained in the above quotation from the decision of the Court of Appeals, so far 934a as it applies to me, can only be based on an erroneous interpretation of my own testimony, no doubt fathered by counsel opposed to Hartford and not answered by Counsel for Hartford in the defense of their client against the over-all charge.

I submit herewith an affidavit setting forth the facts of my connection with the Clarke article as well as I can remember those facts after a lapse of nearly twenty years.

As above stated, not only was I not a party or counsel to any litigation in which the history of the Clarke article was brought up, but there was no opportunity or occasion for me to state in full my connection with the Clarke article, as there was no intimation of any charge against me personally.

All the evidence in the record in connection with my knowledge and use of the Clarke article in the Patent Office is found in Exhibits A and B herewith attached.

As stated in my affidavit, my testimony (Exhibit A) as to the Clarke article in the Toledo suit was given on November 27, 1941. The next day, while still on the witness stand as to other matters, there was presented to me for execution my affidavit (Exhibit B)

for use by Hartford in the suit of Hazel-Atlas v. Hartford-Empire. It was prepared by Hartford's counsel as a statement, in affidavit form, of what I testified to in Court.

In answer to the first two questions asked me when on the stand I acknowledged that I filed the Clarke article in the Patent Office and further acknowledged that the article in question was sent to me by Hatch for revision. This testimony was given after Hatch had been on the stand in Toledo and the history of the Clarke article had been established. I could only say, therefore, that Hatch had sent the Clarke article to me. This does not imply that
935a I had knowledge prior to Hatch's testimony that the Hatch manuscript was substantially the same as the Clarke article.

Later on when I was specifically interrogated as to knowledge I restricted the cross examiner down to what date has was imputing the knowledge. Counsel for the Government who was cross examining me evidently understood that my testimony did not imply knowledge in 1926 of the identity of the manuscript and the printed article because he asked me, "Would you have countenanced, etc.," and "If you had known that the Clarke article was originally written by Mr. Hatch, etc." My reply to these questions was that if I had been acquainted with the facts I would have presented the subject-matter in the form of an affidavit.

It was therefore clear to the examining Counsel that I did not acknowledge knowledge of the identity of the Clarke article and the Hatch manuscript as of 1926.

In the same way my affidavit (Exhibit B) in saying Hatch furnished me in 1926 with a copy of the manuscript of the Clarke article was based on information obtained in 1941 of what the manuscript was that Hatch had shown me and not my knowledge of 1926.

As stated in my affidavit before you, I had no realization in 1926 of such identity.

My testimony was distorted by the ingenuity of counsel opposed to Hartford-Empire as meaning that I knew in 1926 of the identity of what I had revised with what was published.

Counsel for Hartford-Empire apparently were much more interested in defending their client from the consequences of the chain of events recited by the Court than in the protection of the character and reputation of individuals. Perhaps they
936a were justified in so doing but certainly such justification is not a reason for now, in this proceeding, distorting my statement.

All that the records before the Courts can possibly show as to me personally is that I did present the article to the Patent Office (which I submit was a perfectly proper thing to do unless I knew it had been improperly prepared) and that the Patent

Office and the Court of Appeals were not informed as to Hatch's part in the preparation of the article. The essential truth of the article has been universally recognized even by Counsel for Hazel-Atlas (65 S. Ct. 1010, top of second column), and it must be remembered that I was only on the brief before the Court of Appeals in the Hazel-Atlas case, 59 Fed. 2d, 399, and that I did not at the time of the decision therein have any knowledge whatever of the authorship of the Clarke article, except as indicated by the publication of the article under Clarke's name. Indeed, at the time of the trial counsel for Hazel-Atlas apparently knew far more of the facts relating to the Clarke article than I did. (See reference to the affidavit of Edmund P. Wood in 322 U. S. 238 at pages 264 et seq.; 64 S. Ct. 997 at pages 1010 et seq.,

You will note that in the Toledo suit where I gave testimony (as by Exhibit A) there was no redirect examination apparently because there was no intimation that I personally had been guilty of misconduct. As a witness I did not so regard it and consequently did not attempt to volunteer any explanation.

I believe the above is a complete answer to the charges and I shall be glad to appear and answer any questions you may have to ask me.

Respectfully,

VERNON M. DORSEY.

937a IN THE UNITED STATES PATENT OFFICE

District of Columbia, 222

AFFIDAVIT OF VERNON M. DORSEY IN ANSWER TO RULE TO
SHOW CAUSE

VERNON M. DORSEY, being duly sworn, deposes and says:

1. That he is 75 years of age, is a member of the Bar of the Supreme Court of the United States and of various subordinate Federal courts, and of the United States Patent Office (his registration number being 534), and that for 54 years he has had his office at Washington, D. C.

2. That in April 1923 he was appointed associate attorney in the matter of the application of Karl E. Peiler, Serial No. 294,792, which eventuated into patent No. 1,655,391; that the principal attorney in such application was William H. Honiss of Hartford, Connecticut (now deceased), then in charge of the patent department of the Hartford-Empire Company, of Hartford, Connecticut. That subsequent thereto Mr. Robson D. Brown moved to Hartford and became head of the said patent department.

3. That so far as he can recall and as he verily believes, Mr. Brown and himself, on one of Brown's visits to Washington in

the fall of 1925, discussed the advantages that might flow from having Mr. Henry Carter (then well known as the technical advisory of the Owens Bottle Company, which company was a licensee under the said Peiler application and had adopted the use of the Peiler invention) write and publish an article over 938a his own name, stating the reasons leading the Owens Bottle Company to take up the Hartford feeder. This plan for some reason was dropped.

4. Deponent went abroad in January 1926; that upon his return at the end of March or early in April he found on his desk a letter from Mr. Roswell F. Hatch, of Hartford, employed by the Hartford-Empire Company, stating that he (Hatch) had gathered data and had prepared an article, a draft of which he enclosed, and which Hatch stated he would submit to Mr. Maloney, who Hatch stated was president of the Bottle Blowers, with a view of getting Maloney to revise it, and after revision, to publish it.

5. That Hatch in said letter requested deponent's criticism of the draft, but since the article so submitted by Hatch was not of the same nature as the article which had been desired from Mr. Carter, it had little interest to deponent, who, in the press of work awaiting his attention after two months abroad, only hurriedly read it over and returned it to Hatch, with two or three verbal corrections; and that as the only part of the article which appealed to deponent was a graph showing the trend of the art, the rest of its contents made no lasting impression on deponent's recollection.

6. In the latter part of May 1926 deponent was informed by Hatch in a letter (a copy of which is attached as Exhibit C) that Mr. Maloney had refused, entirely for personal reasons, to have anything to do with an article; and that he (Hatch) had then consulted William P. Clarke of Toledo, Ohio, president of the American Flint Glass Workers' Union; that Clarke had stated he would rewrite the article to a considerable extent and publish it over his own name.

939a 7. That during the seven months (March to October) between his reading of the Hatch Manuscript and the filing of the Clarke article in the Patent Office, the contents of the former had been forgotten, and deponent offered the Clarke article to the Patent Office believing it to be truthful in its contents and further believing that it was the honest expression of the views of Mr. Clarke, and so believing, had no hesitation in offering it to the Patent Office in connection with numerous other publications and affidavits for what it might be worth; and that deponent did not know when filing the Clarke article whether the graph contained in it was identical with that prepared by Hatch

from statistics or had been changed and corrected by Clarke, or how closely the Clarke publication followed the draft deponent received from Hatch.

8. That in view of complete lack of knowledge of any question attaching to the preparation and publication of the Clarke article, deponent had no hesitation in calling the attention of the Board to the graph in question as found in the Clarke article (see brief before Board, p. 112) nor in referring to the same graph in the belief (page 18) before the Court of Appeals in the Hazel-Atlas suit.

9. That while deponent was closely associated with Hartford-Empire Company prior to and including 1928, after the last named date his connection with Hartford was only that of a counsel called into cases where his knowledge of the subject-matter involved might be valuable; that as such counsel he took part in the examination of the brief in Hartford-Empire v. Hazel-Atlas (see 59 Fed. (2) 399) and in the preparation of the brief in Hartford-Empire v. Shawkee, 68 Fed. (2d) 726.

940a He further says that he was not of counsel in Shawkee 1. Hartford-Empire, 73 Fed. (2d) 1013 or in either of the cases recently decided by the Supreme Court.

10. That the above is a complete statement of his connection with the Clarke article; that he never met Clarke; that he never communicated with Clarke in any way; that he did not know there was a charge of any impropriety in the manner in which the Clarke article was published until 1934 (see petition for certiorari, 292 U. S. 640); that he had no connection or knowledge of any kind of any contacts between Hatch and Clarke after the publication of the article, until it became a matter of general conversation long after the decision of the Hazel-Atlas infringement suit; that he had no knowledge of any payment of money to Clarke until such payment was brought out in the Toledo trial; that he had no part in the settlement between Hazel-Atlas and Hartford in 1932; that so far as he knows the only reason for the publication by Clarke of the article was, as deponent understood, that Clarke considered that such authorship might add to his (Clarke's) prestige; and that he had no correspondence with Mr. Henry Carter, direct or indirect, in 1926 as to the Clarke article.

11. That deponent was briefly cross examined at the Toledo trial on November 27, 1941 as to the Clarke article; that attached hereto as "Exhibit A" is a full and correct copy of his testimony then given relating thereto; that such examination took him entirely by surprise as the Clarke article was not alluded to in his direct and his testimony as then given was based on such recollection as one can recall on the witness stand of an event occurring

941a nearly twenty years previously, which from its nature did not impress itself on his mind; and that for this reason and because he was not interrogated fully, either on cross or redirect examination, such examination did not bring out certain facts here stated.

12. That on November 28, 1941, which was the day following the giving of such deposition, he was requested to execute an affidavit prepared and handed to him by counsel for Hartford-Empire in the suit of Hazel-Atlas v. Hartford-Empire recently decided by the Supreme Court, and that Exhibit B hereunto attached is a true and correct copy thereof.

13. That to the best of deponent's belief Exhibit A and B are all that was before the Toledo District Court or the Circuit Court of Appeals or the Supreme Court relating or in any way referring to this deponent in the recent suits against Hartford-Empire by Hazel-Atlas and Shawkee, and all the Courts had to go on in passing any censure on deponent.

VERNON M. DORSEY.

Sworn to and subscribed before me this 6th day of November 1944.

CATHERINE S. WILTON, *Notary Public*.

My Commission expires April 30, 1948.

954a

Respondents' Exhibit HB-57

3. Reference to the Clarke Article in the Patent Office

During the year 1926, one of the Hartford-Empire Company's important applications was being prosecuted ex parte after a long series of interferences. This was Peiler application Serial No. 294,792, filed May 5, 1919, patented January 3, 1928, No. 1,655,391. The attorney of record was the firm of Dorsey & Cole, Washington, D. C., under an associate power of attorney from Mr. William H. Honiss of Hartford-Empire Company. Mr. Vernon M. Dorsey of the Dorsey & Cole firm had charge of the application and I worked with him extensively on it. We desired to present to the Patent Office a full showing as to the patented and practical art. We therefore filed a considerable number of affidavits and publication exhibits, among them the Clarke article. I submit herewith as Exhibit 3 a copy of the file wrapper and contents of this Peiler application, printed as Vol. V of the appeal record in Hartford-Empire Co. vs. Hazel-Atlas Glass Co. (59 F. 2d 399). The Clarke article is mentioned at pp. 263-4 and 477, is reproduced at pp. 303-5, and is printed at pp. 592-605.

The article did not bear directly on the invention claimed in the application, which invention, shortly stated, was a particular way

of producing and shaping suspended masses of molten glass by first allowing some of the glass to flow down out of an outlet and then forcing more glass through the outlet at a higher rate, by means of a plunger or otherwise, thus, "stuffing" or enlarging the mass and giving it a desired shape. This method was not mentioned in the Clarke article. Compare the article, Exhibit 1 hereto, with any claim of the Peiler patent 1,655,391 granted on the application in which the article was filed, a copy of which 955a is submitted herewith as Exhibit 4. The article thus had nothing to do with the particular claims being sought. It did mention the broader method of suspended-charge feeding or "gob feeding" in which a mass of glass, however produced and however shaped, is detached while hanging in the air and dropped into a mold; but the Peiler application did not claim this "gob feeding" broadly. Suspended-charge or "gob" feeding is a necessary foundation for the "stuffing" method of shaping which was being claimed in the Peiler application, because the "stuffing" method of shaping suspended charges cannot be practiced without suspended charges; but suspended charge feeding or "gob feeding" can be practiced with other methods of shaping the charges of glass to suit the shape of the molds, and without using the "stuffing" method. This was done with Hartford-Empire feeders of the "paddle" type that preceded the Hartford plunger feeders which employed the "stuffing" method and which proved to be greatly superior in competition with the Owens machine. Thus the Clarke article's account of the success of "gob feeding" was simply a matter of historical background for the invention being claimed.

It should also be noted that the inventor Peiler was not mentioned in the Clarke article, and that the Hartford-Fairmont Company (predecessor of the Hartford-Empire Company) was mentioned in the article only as one of several suppliers of glass-feeding machinery. Indeed, the article mentioned feeders supplied by another concern, the Howard Company, more frequently than it mentioned feeders supplied by the Hartford company. It did not ascribe the invention of "gob feeding" to any particular inventor.

When Mr. Dorsey and I filed the Clarke article in the Patent Office, I regarded it as true in every respect and as Clarke's own article. I still so regard it. I did not know how much of the article was in Clarke's words and how much was in Hatch's. Nor did I think that this made any difference, because I had been informed, as before stated, that Mr. Clarke intended to revise and correct the article and, later, that he had done so. I then had good reason for regarding the article as Clarke's because, before I participated in filing the article in the Patent Office, I had been assured, as before stated, (1) that every-

thing in the article was true, (2) that Mr. Clarke was well qualified by his own knowledge and experience to vouch for and publish the article, and (3) that Mr. Clarke was interested in publishing the article, doubtless as a bit of publicity for himself and for the labor unions, and had not signed the article merely on request, but had been extremely careful in checking and verifying all statements in the article and had then revised, signed and adopted it and released it for publication as his article, insisting that it must be printed exactly in the form in which he signed it.

So regarding the article as Clarke's it did not occur to me that there was any necessity of explaining its initial authorship to the Patent Office. The truth of the article and its actual adoption by Clarke seemed to me to be the only important considerations. I am not able to see how a tribunal can be deceived by telling it the truth through the mouth of a responsible witness, even though that witness adopts words written by another instead of composing them himself.

The accompanying printed copy of the application file wrapper and contents of the Peiler patent 1,655,391 (Exhibit 3) shows the large number of affidavits and publications which were filed in the application, in addition to the Clarke article, and that 957a the Clarke article was a minor part of the case and wholly a matter of collateral background. It also shows that the Patent Office made no reference to the Clarke article at any time and appears to have paid little or no attention to it. The application was rejected and then finally rejected by the Primary Examiner after the Clarke article was filed (pp. 306-319), and the Board of Appeals, in the first of its two decisions, affirmed the Primary Examiner (pp. 684-691). The Board's principal ground of affirmance was a Howard patent, which was satisfactorily overcome under Rule 75 (Board's second decision, p. 732). The patent issued January 3, 1928, No. 1,655,391 (Exhibit 4 hereto).

On the appeal to the Board of Appeals, Mr. Dorsey and I filed an extensive brief in which one reference was made to the Clarke article (Exhibit 3, p. 477). It has been suggested that the words on this page "reluctant witnesses" referred to Mr. Clarke and to Mr. Heintzelman, whose affidavit and published article were also mentioned. I know that this suggestion is incorrect. I clearly remember that the sentence including "reluctant witnesses" was dictated in my presence by Mr. Dorsey, and that the "reluctant witnesses" he was referring to were the former Presidents of the labor union whose reports are quoted in the Clarke article, and who obviously were reluctant to have their union members displaced by automatic machinery.

1054a

Respondents' Exhibit HB-67

Excerpt from HB Ex. 67 which consists of the complete testimony of Roswell F. Hatch, as printed in the record in the Supreme Court of the United States in *Hartford-Empire Co. v. United States*, Nos. 7-16, October Term, 1943.

3099 Q. Who besides Mr. Carter did you tell that the purpose that you had in mind that the article should be printed under the name of some apparently unprejudiced authority?

A. I told all of those who were associated in my company.

Q. Tell us who they are—I am sorry, Judge Haight wants the names, so do I?

A. The names that I gave you before.

Q. Mr. Brown?

A. Mr. Brown.

Q. Mr. Knox Smith?

A. Yes.

Q. Mr. Peiler?

A. Mr. Peiler; yes.

Q. Mr. Goodwin Smith?

A. No; I don't think he had anything to do with it.

Q. You did not talk with him about it?

A. No. I was turned over to Mr. Brown. I didn't have any discussion with Mr. Goodwin Smith about it.

Q. Are you sure you did not mention it to him just casually?

A. No; he didn't bother about what I was doing and I [fol. 5654] didn't bother him.

Q. That was something that he would not have anything to do with?

A. No; it was——

3100 Q. I see, did you tell Mr. Dorsey about it; you mentioned Mr. Dorsey's name before?

A. Yes.

3111 Q. Now, you testified before the recess that Mr. Dorsey knew what was going on; am I correct in my recollection?

A. He did; yes, sir.

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In the Supreme Court of the United States

OCTOBER TERM, 1948

No. —

**LAWRENCE C. KINGSLAND, COMMISSIONER OF
PATENTS, PETITIONER**

v.

VERNON M. DORSEY

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT**

The Solicitor General, on behalf of Lawrence C. Kingsland, Commissioner of Patents, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above-entitled case on January 26, 1949.

OPINIONS, BELOW

The findings and opinion of the District Court of the United States for the District of Columbia (R. 20-49) are reported at 69 F. Supp. 788. The opinion of the United States Court of Appeals for the District of Columbia Circuit (R. 141-156) has not yet been reported.

JURISDICTION

The judgment of the Court of Appeals was entered on January 26, 1949 (R. 156). The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTIONS PRESENTED

1. Whether the standards of ethical conduct for practice before the Patent Office approved by this Court in *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U. S. 238, were binding on the court below in reviewing an order of the Commissioner of Patents which barred respondent from practice before the Patent Office.

2. Whether there was sufficient evidence in the record before the Commissioner of Patents to support his order barring respondent, one of Hartford's attorneys, from practicing before the Patent Office on the ground that respondent had participated in perpetration of the fraudulent scheme specifically condemned by this Court in the *Hazel-Atlas* case.

3. Whether there was any denial of due process of law in the proceedings leading up to the Commissioner's order barring respondent from practice before the Patent Office.

STATUTE INVOLVED

35 U. S. C. 11 reads as follows:

The Commissioner of Patents, subject to the approval of the Secretary of Commerce, may prescribe rules and regulations governing the

recognition of agents, attorneys, or other persons representing applicants or other parties before his office, and may require of such persons, agents, or attorneys, before being recognized as representatives of applicants or other persons, that they shall show that they are of good moral character and in good repute, are possessed of the necessary qualifications to enable them to render to applicants or other persons valuable service, and are likewise competent to advise and assist applicants or other persons in the presentation or prosecution of their applications or other business before the Office. The Commissioner of Patents may, after notice and opportunity for a hearing, suspend or exclude, either generally or in any particular case, from further practice before his office any person, agent, or attorney shown to be incompetent or disreputable, or guilty of gross misconduct, or who refuses to comply with the said rules and regulations, or who shall, with intent to defraud in any manner, deceive, mislead, or threaten any applicant or prospective applicant, or other person having immediate or prospective business before the office, by word, circular, letter, or by advertising. The reasons for any such suspension or exclusion shall be duly recorded. The action of the commissioner may be reviewed upon the petition of the person so refused recognition or so suspended or excluded by the district court of the United States for the District of Columbia under such conditions and upon such proceedings as the said court may by its rules determine. (R. S.

§ 487; Feb. 14, 1903, ch. 552, § 12, 32 Stat. 830; Feb. 18, 1922, ch. 58, § 3, 42 Stat. 390; June 25, 1936, ch. 804, 49 Stat. 1921.)

STATEMENT

A. *Background*: Respondent Dorsey is an attorney who during the period covered by the facts here involved was patent counsel for and a member of the Board of Directors of Hartford-Empire Company (R. 56).¹

The July 17, 1926, issue of the National Glass Budget, a trade publication in the glass industry, contained an article entitled "Introduction of Automatic Glass Working Machinery; How Received by Organized Labor by William P. Clarke, President, American Flint Glass Workers Union." A copy of this article, accompanied by a letter of transmittal signed by Vernon M. Dorsey, respondent herein, was filed among other things in the Patent Office on October 11, 1926, by the attorneys for Hartford-Empire Company (successor to Hartford-Fairmount Company) (Hartford) as an appendix to the supplemental amendment to Hartford's Peiler application No. 294,792, filed on May 5, 1919, for a patent for a method of and apparatus for feeding molten glass. (R. 66, Ex. HB-61, Tr. 815-821).

¹ The entire transcript of record of the proceedings before the Patent Office was in the record before the courts below and has been certified to this Court, but only the joint appendix and addenda to respondent's brief below are included in the printed portion of the record here. As permitted by stipulation of counsel (R. 158), this brief refers to portions of the transcript of the record before the Patent Office (Tr.), some pertinent parts of which are set forth in the appendix to this petition, *infra*, pp. 28-31.

At the time of this amendment, many of the claims in the application had already been rejected once by the Primary Examiner. After final rejection of the claims by the Primary Examiner, the Clarke article was reprinted in the Appendix to a brief signed by Dorsey and Robson D. Brown and was urged, *inter alia*, upon the Office's Board of Appeals as the recognition by a reluctant witness of the tremendous success of Hartford's feeders (R. 119, Ex. E, pp. 477-478, 509, 593-605). The Board of Appeals affirmed the Examiner's holding that the claims were unpatentable over prior art references (Ex. E, pp. 684-691). At rehearing, in connection with which a brief signed by Dorsey was filed, the Examiner was reversed, and the claimed invention held patentable with respect to all but two claims. Patent No. 1,655,391 (Peiler patent) on these claims was issued on January 3, 1928 (Ex. E, pp. 732-734). In the subsequent litigation with Hazel-Atlas Glass Company (Hazel-Atlas), the Clarke article was cited in Hartford's brief in the Third Circuit Court of Appeals and quoted extensively by Judge Buffington in his opinion in 1932, holding (Judge Woolley dissenting) that the Peiler patent was valid and had been infringed. *Hartford-Empire Co. v. Hazel-Atlas Glass Co.*, 59 F. 2d 399. See, also, *Shawkee Mfg. Co. v. Hartford-Empire Co.*, 68 F. 2d 726 (C. A. 3).

In the course of the Government's anti-trust proceeding against Hartford begun in 1939 in the United States District Court for the Northern Dis-

trict of Ohio, Western Division, the fact that the Clarke article had been written by an employee of Hartford, named Hatch, who had persuaded Clarke to sponsor the article, for the purpose of filing it with the Patent Office as the views of an apparently unprejudiced and reluctant witness was brought to light. *United States v. Hartford-Empire Co.*, 46 F. Supp. 541, 612 (N. D., Ohio). Based on the information thus disclosed, Hazel-Atlas and Shawkee Mfg. Co. petitioned the Court of Appeals for the Third Circuit to vacate and set aside its prior judgments on the ground of fraud. That court, while it described the story as sordid and pointed by name to four participants, including Dorsey, held that it would be without power to reopen its judgment. *Hartford-Empire Co. v. Hazel-Atlas Co.*, 137 F. 2d 764, 766. This Court, in reversing, was unanimous in its condemnation of the Clarke transaction as fraudulent. *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U. S. 238, 245-246, 251.

B. The Disbarment Proceeding: On October 11, 1944, shortly after this Court's denial of rehearing in the *Hazel-Atlas* case (322 U. S. 772), the Commissioner of Patents issued separate orders to each of the four men named in the Third Circuit's opinion as the perpetrators of the fraud, Vernon M. Dorsey, Hartford's Washington patent attorney, Roswell F. Hatch, Robson D. Brown, employees of Hartford, and Henry W. Carter, an of-

ficial of Owens-Illinois Bottle Company (Owens) to show cause why he should not be suspended or excluded from further practice before the Patent Office for gross misconduct (R. 12-13). In the order, the Commissioner set November 9, 1944, as the date for hearing before his Committee on Enrollment and Disbarment, and charged that it appeared from the records in the *Hazel-Atlas* case and the antitrust case that each of these men

* * * participated in the preparation of [the Clarke] article and/or the presentation thereof to the United States Patent Office during the prosecution of said patent application knowing that said article was not written by said William P. Clarke, and with the purpose of deceiving the Patent Office as to the authorship of said article and influencing the action of the Patent Office on said application * * *.

In accordance with the show cause orders, a hearing was held beginning on November 21, 1944, before a Committee on Enrollment and Disbarment composed of seven Patent Office officials. The case on behalf of the Patent Office consisted solely of the records in the *Hazel-Atlas* and the antitrust cases, which were introduced as the basis for the show cause orders, and as evidence for the limited purpose of proving against each defendant admissions and letters and documents written or received by that defendant. (R. 56-57, Tr. 32-38.) Thereafter, the defendants called and examined witnesses, including each of the defendants. At the

close of the hearing, time was granted to file briefs, after which oral argument was heard by the Committee, with the Commissioner sitting in. (R. 22.) On April 26, 1945, the Committee submitted a report to the Commissioner setting out its findings which may be briefly summarized as follows (R. 50-92):

C. Committee's Findings: In the latter part of 1925, Carter discussed with Brown, who in turn discussed with Dorsey, their interest in having an article prepared and signed by "some competent authority and placed before the Examiner" relating to gob feeders for filing in the Peiler application (R. 57, 95, 99). Shortly thereafter, Hatch, who reported to, and consulted with, Brown as his superior officer in Hartford, commenced the preparation of an article relating to automatic glass machines, which was completed early in 1926 (R. 58). The principal object of the article admittedly was to make a comparison "between the commercial success of the Owens suction machine and feeders of the gob type" (R. 58, Tr. 531). In the preparation of the article, Hatch consulted both Dorsey and Carter as well as the Reports of the Annual Conventions of the Glass Bottle Blowers Association (a labor union) and various other publications. (R. 58, 99-100.) As finally drafted by Hatch, the article quotes extensively from these reports in order to provide "bait" held out to induce a labor leader named James Maloney who was President

of the Glass Bottle Blowers Association to sign the article (R. 59, Ex. D-72-C, Tr. 759). Carter was fully informed about these matters, and severely criticized the accuracy of the article and suggested important changes therein (Ex. C-70-3, Tr. 745), but Hatch indicated that he had "prepared this article so far as possible with reference only to the proceedings of The Bottle Blowers Association, and knowingly and intentionally I reproduced some of the errors found therein" (R. 61; Ex. C-70-4, Tr. 754; D. Ex. B, p. 40). Brown was likewise informed and he authorized Hatch to go ahead (R. 62; Tr. 356, 417, 418, 474).

Dorsey was also provided with a manuscript copy of the article (R. 101, 106). Dorsey made two or three minor corrections in the manuscript and returned it to Hatch (R. 62, 100). Dorsey knew that Hatch intended to ask Maloney to sign the article, and he desired a copy when signed for filing in the Peiler application (R. 62, 107-109, 114). Subsequently, he wired Hatch for a copy (R. 62, 115), to which Hatch replied on May 20, 1926 (R. 62-64, Ex. D-72-C, Tr. 759):

You flatter me again by wiring for a copy of the so-called "Maloney" article. I enclose one of the original drafts which I made and you will understand that Mr. Maloney will never appear in connection with this article in any way. Moreover, when the article appears in print, it will probably be changed considerably from the present form.

* * * * *

* * * I went to see Mr. William P. Clarke, of Toledo, the President of the American Flint Glass Workers' Union. Mr. Clarke also swallowed the labor bait which I had prepared for him and said he would be glad to revise and publish the article over his own signature if I would get assurance for him that the Owens Company would not be offended. * * *

* * * Clarke said that he would rewrite the article to a considerable extent, I suspect, and publish it in the Trade Journals. I fear I may have to go out to Toledo again to get Clarke to show some speed in this matter and perhaps to supervise what he publishes. I think he understood just what we want published, but he might unintentionally destroy some of the propaganda which we planned.

I will see that you get a copy of some Journal in which this article appears when it comes out.

* * * * *

In the course of obtaining clearance from Owens, Carter, on May 25, 1926, addressed a memorandum to W. H. Boshart, its President, in which he said in part (R. 65-66; Ex. C-70-7, Tr. 763; D. Ex. B, p. 41):

It occurs to me that I should make myself more clear about the purpose of the Hatch article.

He has prepared it with the idea of getting it printed under the name of some apparently

unprejudiced authority, and then calling the attention of the Patent Office Examiner to the article as published, in the belief that the Examiner will thereby be influenced to a more favorable consideration of Hartford's broad claims.

* * * * *

Under the circumstances, I do not see that we need be very critical in our treatment of the article. If not too rank, would say that we better let it go through. Of course any particular statements can be corrected or cut out.

Owens thereupon agreed to the publication of the article. Immediately upon receiving, in addition, the consent of Maloney, Clarke on July 7, 1926, telegraphed Hatch that he would "sponsor article with very slight alteration and modifications" (R. 66, Ex. HB-10, Tr. 778, D. Ex. B., p. 132). Clarke signed the article some time the next day and handed it to Hatch, who was then in Philadelphia (R. 66). Hatch forwarded the article without delay to the editor of the National Glass Budget requesting that it be published promptly and advising him that Clarke would "not insist on seeing a proof if it is going to take extra time" (R. 66, Tr. 543). The article appeared in the July 17, 1926 issue of the National Glass Budget (R. 66). Dorsey requested a copy of the article (R. 69, 106-107), and a copy as printed was presented by Dorsey and Brown to the Patent Office as part of the October

11, 1926, amendment in the Peiler application² and later made use of by them in a brief filed with the Board of Appeals, as indicated *supra*, p. 5. Although they all knew before the article was filed in the Peiler application that it was to be filed therein, none of them ever disclosed to the Patent Office prior to the disbarment proceeding that the article was written and inspired by Hatch (R. 70).

The Committee went on to describe Hartford's payment of \$8,000 to Clarke shortly after the decision of the Court of Appeals for the Third Circuit which quoted extensively from the article (R. 74-82). These events relevant to the conduct of the defendants with respect to the Clarke article occurred nearly six years after the filing of the article. "These subsequent events," the Committee noted, "cast their light backwardly on the activities of the parties during the time of preparation and filing of the Clarke article, giving added illumination with regard to the purposes, understandings, and intentions of [defendants] at that time" (R. 74). The Committee noted that Dorsey did not participate in these events. (R. 74.)

Based on these findings, the Committee was of the opinion that the record conclusively established that (R. 90)

* * * in the perpetration of such concealment all of the respondents deliberately col-

² The Committee noted that from the standpoint of practice, the filing of this amendment was timely since the Examiner was on the verge of finally rejecting all of the claims in the application (R. 71).

laborated not only with each other but also directly or indirectly with Clarke, and that all of the respondents connived with each other with the intention of misleading and deceiving the officials of the Patent Office as to the true state of the said material facts concerning the connection of Hartford with the preparation and publishing of the article with Clarke's name appearing thereon as the author thereof, when in fact he was not the true author thereof, and all this for the purpose of securing favorable action by the Patent Office with respect to the claims in the Peiler application.

Five members of the Committee accordingly recommended to the Commissioner that respondents be disbarred from further practice before the Patent Office; the remaining two members recommended suspension for a definite period of time (R. 90-92). The Commissioner, on May 18, 1945, ordered the disbarment of all four defendants (R. 14-15).

D. Court Review: Three of the defendants³ sought review of these orders in the United States District Court for the District of Columbia in accordance with 35 U. S. C. 11. The District Court, after hearing extensive argument lasting five days, affirmed the Commissioner's order. (R. 20-49). Commenting that in such proceedings its function

³ The fourth, Robson D. Brown, died in the period between the Commissioner's order and the filing of the petition for review.

was limited to a determination whether a fair hearing had been had after due notice of the charges and whether there was substantial evidence to support the Commissioner's action (R. 24-25), the court held that the charges in the show cause orders were sufficient basis to sustain the Commissioner's action and sufficiently apprised defendants of the matters they were called upon to answer, and that there was substantial evidence in the record here to support the Commissioner's action. This conclusion was reached after a detailed review of the evidence in the record as to the preparation and filing of the Clarke article, and after referring to the events occurring thereafter "only as they may throw light upon the acts of the petitioners and their intent with respect to the Clarke article" in regard to the proceedings before the Patent Office (R. 34). On the appeal to the court below taken only by respondent, the judgment of the District Court was reversed by a divided court. Judge Clark delivered the opinion in which Judge Miller concurred (R. 141). Judge Edgerton dissented in a separate opinion (R. 155).

REASONS FOR GRANTING THE WRIT

This case involves the very transaction held fraudulent by this court in *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238. Respondent has been ordered disbarred by the Patent Office for participation in that fraud. Although undisputed evidence showed that respondent

knowingly contributed to the effectuation of the scheme, the court below has held his conduct entirely lawful, and indeed has even found that the entire transaction condemned by this Court was legitimate. The decision below thus conflicts with a holding by this Court concerning the very same transaction.

The case is also important as the latest of a series of pronouncements by the court below which fail to hold persons dealing with agencies of the federal government and with the public to basic standards of honesty and fairness which the agencies have sought to enforce and which this Court has approved. *WOKO, Inc. v. Federal Communications Commission*, 153 F. 2d 623, reversed, 329 U.S. 223; *Broadcasting Service Organization, Inc. v. Federal Communications Commission*, 171 F. 2d 1007, pending on petition for writ of certiorari, No. 584, this Term; *Hannegan v. Read Magazine*, 158 F. 2d 542, reversed, *sub nom. Donaldson v. Read Magazine*, 333 U.S. 178. Cf. *Precision Instrument Co. v. Automotive Co.*, 324 U.S. 806. In addition, the opinion below, without any basis in the record, goes to extremes to castigate an administrative agency for conduct which was not only entirely lawful and proper but which is in harmony with this Court's decisions. Under the decision below it will be difficult, if not impossible, for the Commissioner to enforce and give effect to the high standards laid down by this Court's decisions, inasmuch as review of disbar-

ment orders of the Commissioner of Patents is restricted to the courts of the District of Columbia Circuit. 35 U.S.C. 11. In view of the strategic position of the court below for reviewing administrative action generally and the proceedings of the Patent Office in particular, these facts in themselves call for an exercise of the supervisory authority of this Court.

The standards of conduct which the court below has approved give the case an importance much greater than the right of a single attorney to practice before the Patent Office.*

1. The court below has held that the filing in the Patent Office of the so-called Clarke article, which was written by Hartford's representatives but signed by Clarke, an ostensibly disinterested expert, in support of Hartford's Peiler patent application did not constitute fraud on the Patent Office, on the ground that "The test should have been the truth or falsity of the facts set out in the article and we do not understand that the truth of these statements has been called into question in any quarter" (R. 152). It further held that the Patent Office, by placing any reliance on the article, was remiss in its duty "to investigate these matters for itself, and not to shift the burden of its own responsibilities to a blind reliance on some article presented from some trade journal,

* It is, of course, unfortunate that the fraudulent scheme remained undiscovered for so long, and that as a result Mr. Dorsey is now almost 80 years old, but "the public and social interests in discouraging the fraudulent procurement of patents

which with ordinary intelligence it might have known to be self-serving for the party offering it" (R. 143).

The holdings squarely conflict with the express rulings to the contrary of this Court in the *Hazel-Atlas* case in regard to this very transaction. In that case, this Court reviewed in detail the circumstances relating to the preparation of the Clarke article, its filing in and use before the Patent Office and the Third Circuit.

The Court expressly rejected as immaterial the contention that the contents of the article were true, commenting "Truth needs no disguise. The article, even if true, should have stood or fallen under the only title it could honestly have been given—that of a brief in behalf of Hartford, prepared by Hartford's agents, attorneys, and collaborators." 322 U. S. at 247.⁵ And it refused to appraise the influence exerted by the Clarke article. "Hartford's officials and lawyers thought the article material. They conceived it in an effort to persuade a hostile Patent Office to grant their patent application, and went to considerable trouble and expense to get it published * * *. They are in no position now to dispute its effectiveness." 322

seem to me to outweigh appellant's interest in his reputation and practice." (Edgerton, J., dissenting R. 156.)

⁵ The District Court's opinion pointed out in this connection (R. 45):

The truth of the statements in the Clarke article was not an issue in these proceedings. It was expressly stated during the course of the hearings that it was not. Even though the article contained no mistakes or false statements, its weight as evidence depends as much upon its origin as its content.

U. S. at 247. Cf. *Federal Communications Commission v. WOKO, Inc.*, 329 U. S. 223. This Court concluded, "even if we consider nothing but Hartford's sworn admissions, we find a deliberately planned and carefully executed scheme to defraud not only the Patent Office but the Circuit Court of Appeals" (322 U. S. at 245-246), and required that Hartford's prior judgment be vacated and Hartford be denied all relief. Refusal of the court below to accept these rulings is, we submit, sufficient in itself to warrant certiorari here.

The decision below condemns the Patent Office for "wait[ing] more than eighteen years until the evidence had largely disappeared to bring stale charges against" respondent (R. 144). But a similar contention was made in this Court against the reopening of the judgment adjudicating the validity of the patent. The Court noted that "Indisputable proof of the * * * facts was, for the first time, fully brought to light in 1941 by correspondence files, expense accounts and testimony introduced at the trial of the *United States v. Hartford-Empire Company et al.*, 46 F. Supp. 541, an anti-trust prosecution begun December 11, 1939." 322 U. S. at 243. The Commissioner of Patents promptly issued the show cause order here after the *Hazel-Atlas* case was finally terminated by this Court's denial of rehearing. 322 U. S. 772. See R. 56.*

* *In re Adriaans*, 28 App. D.C. 515, relied on by the court below as a "hay-horse" case (R. 142), is distinguishable and

2. The characterization of the court below of the proceeding before the Patent Office's Committee on Enrollment and Disbarment as a "kangaroo court" (R. 144) and as "a classic exemplification of a citizen being deprived of a valuable right * * * without due process of law or indeed without process of law of any kind except bureaucratic 'lynch law' " (R. 141) was, we submit, utterly unjustified. The bases for the rejection by the court below of the decision of the Patent Office were (1) that there was not "a shred of evidence to connect" Dorsey with any fraud (R. 144), (2) that the consolidation of Dorsey's case with that of the other practitioners involved was a "record of mob procedure", constituting a "shot-gun joindure" (R. 149-150); (3) that Dorsey was convicted on charges not made and not given adequate notice of the charges against him (R. 144, 152); and (4) that the burden of disproving the allegations against him was improperly imposed upon Dorsey (R. 144).

a. Although the majority below found the evidence insufficient to support the findings, on substantially the same evidence both the Court of Appeals for the Third Circuit in the *Hazel-Atlas* case

not here controlling. In that case there was a 12-year delay in instituting charges, although all the facts relating to the alleged misconduct were known from the outset. In the present case, on the other hand, the delay was due to Hartford's success in concealing for at least 13 years the facts surrounding the Clarke article. Such success does not, of course, create a prescriptive right to exemption from the consequences of the fraud. Cf. R. 156 (Judge Edgerton dissenting).

(137 F. 2d 764, 766, quoted at R. 52-53) and the District Court in the antitrust case (*United States v. Hartford-Empire Co.*, 46 F. Supp. 541, 612, quoted at R. 54-55), had declared that Dorsey had participated in the fraudulent scheme. Judge Edgerton, dissenting below, thought the proof as to Dorsey "conclusive", and Judge Morris, in the District Court, held that there was "ample and substantial evidence" to support the Commission's findings to that effect (R. 44).

The evidence which proves this conclusively is set forth at length in the findings of the Patent Office Committee (R. 57 *et seq.*) and in Judge Morris' opinion (R. 26 *et seq.*). It seems sufficient here to refer to the following facts:

Dorsey was a party to the original discussions which resulted in the Clarke article (R. 57, 95-96, 100). Hatch consulted with Dorsey in preparing the article (R. 58, 100). Dorsey admitted that he had received the manuscript from Hatch and made several minor suggestions (R. 130, 137). Subsequently, he requested a copy of the article (R. 62, 115), and received a letter from Hatch (quoted at pp. 9-10, *supra*), which describes the plan to have Clarke sign the article and publish it in a trade journal. Hatch testified that "Mr. Dorsey knew what was going on" (Exhibit 67, p. 3111).¹ And Dorsey admitted that at his request a copy of the

¹ Exhibit 67 is Hatch's testimony in the antitrust case which, reprinted, was introduced in evidence by Hatch in the present proceeding (Tr. 472-473).

magazine containing the article was obtained and filed as a part of the Patent Office record in the Peiler application (R. 131, 110). A brief subsequently filed by Dorsey in the Patent Office, in the Appendix to which the article was printed in full (Ex. E, pp. 509, 593-605) stated (R. 73, Ex. E, pp. 477-478):

That the appellant's feeders have been a tremendous success and have revolutionized the art from the standpoint of economy is recognized by reluctant witnesses. We call attention to the article by William P. Clarke
* * *

Brown testified that "Mr. Dorsey and I spent a great deal of time on that brief," and that "I happen to remember that that particular paragraph which I have read was dictated by Mr. Dorsey in my presence" (R. 96, see Tr. 376.) This was all done at a time when there was great danger that the Patent Office would not approve the application (see p. 5, *supra*).

These facts, we submit, establish without any question that Dorsey was a knowing participant in the fraudulent scheme, despite the inability of the court below to find "even a shred of evidence" to that effect.

The majority below disagreed with the views expressed by Judge Edgerton (R. 156) and Morris (R. 24-25) as to the applicability of the substantial evidence rule to test the Commissioner of Patents' findings of fact, and thought that the appellate

court was entitled to examine the record *de novo* (R. 144-148). The scope of review in such cases as this presents an important question. But on the evidence in this record, whatever the proper function of the appellate court in reviewing the evidence, Dorsey's participation in the fraudulent scheme was conclusively shown.

(b) Although respondent had never so argued, the court below found that Dorsey's case had been improperly joined with those of the other three practitioners before the Patent Office, and that this constituted a "mob procedure." (R. 149) Such a consolidation of cases arising out of the same transaction would have been entirely lawful even if the parties had not consented. Cf. Federal Rule of Civil Procedure 20. Here, moreover, the four attorneys expressly agreed to the consolidation of the four cases for the purpose of making a joint record. Tr. 60-61, printed in the Appendix *infra*, p. 31.*

(c) The record is equally clear, as the District Court (R. 47) and the dissenting judge noted (R. 165), that the show cause order apprised respondent of the matters which he was called upon to answer, and that he was found guilty only of these charges, i.e., "participat[ing] in the preparation of [the

* The court below found nothing in the record to support the assertion in the Government's brief below that the parties had consented to the consolidation (R. 149). Since there had been no controversy between the parties as to this point, that portion of the transcript had not been printed by either party in the court below.

Clarke] article and/or the presentation thereof to the United States Patent Office during the prosecution of [the Peiler] patent application knowing that said article was not written by said William P. Clarke, and with the purpose of deceiving the Patent Office as to the authority of said article and influencing the action of the Patent Office on said application" (compare R. 13 (charges in show cause order), with R. 89-90 (charges of which the Committee found respondent guilty)). See *supra*, p. 7. That respondent was in fact fully apprised of these charges is manifest from respondent's answer filed in reply to the show cause order before the introduction of any evidence (R. 132-140).⁹

The court below (R. 154) stresses in this connection the Committee's reference to payments to Clarke in 1932 and to the use of the article in the Court of Appeals for the Third Circuit. But as the District Court recognized (R. 34), the Committee considered these subsequent events not in support of additional charges, but only as they "cast their light backwardly on the activities of the parties during the time of preparation and filing of the Clarke article, giving added illumination with regard to the purposes, understandings, and intentions of respondents at that time" (R. 74). Proof as to these activities (in which Dorsey was not found to have participated (R. 74)) did

⁹ We do not know upon what the opinion below relied for the "five counts" (R. 150) on which it says the Patent Office found Dorsey guilty. There are no such charges in the record.

not constitute additional charges which Dorsey had no chance to meet.

(d) The court below thought that the Patent Office had improperly imposed upon the respondent attorneys the burden of proving their innocence. What happened was that the Committee first received as evidence from the Department of Commerce, the records in the earlier cases "only to the extent that they contain written evidence in the form of admissions and certain other papers hereinafter identified as having been signed, sent, or received by these respondents as they purport to have been" (R. 56-57. See Tr. 32-38). In the absence of explanation this established *prima facie* the fraud and respondents' participation in it. The effect, as all parties understood, was to shift to the respondents the burden of going forward with the introduction of evidence to rebut the Government's *prima facie* case. Respondents did not at that time object to this procedure; on the contrary the attorney for two of them, with no dissent from Dorsey, agreed to it (Tr. 17-19, Appendix *infra*, pp. 28-31). The remaining evidence in the record was introduced entirely by the respondents.

This did not mean that the burden of proving innocence rested upon the respondents. The Patent Office did not hold that any such burden had been placed upon respondents, or that they had failed to sustain it, but that the "record
* * * indubitably and conclusively shows and

establishes that the respondents and each of them has been guilty of gross misconduct." (R. 89.)

3. Review of the decision below is important here not only because the court below has refused to accept the rulings of this Court as they affect this particular case, but because its opinion, together with its opinion in *Broadcasting Service Organization, Inc. v. Federal Communications Commission*, 171 F. 2d 1007, pending on petition for writ of certiorari, No. 584, this Term, reflects a conception of the duties of practitioners before administrative agencies which is substantially lower than the uncompromising obligation to be honest and to make full disclosure prescribed by this Court in the *Hazel-Atlas* case, in *Precision Instrument Co. v. Automotive Co.*, 324 U.S. 806, and in *Federal Communications Commission v. WOKO*, 329 U.S. 223. Cf. *Hannegan v. Read Magazine*, 158 F. 2d 542, reversed *sub nom. Donaldson v. Read Magazine*, 333 U.S. 178, which also involved the failure of the court below to recognize the fraudulent nature of a plan to deceive the public.

In particular the court below plays a vital role in the review of Patent Office decisions, since jurisdiction to review Patent Office disbarments is vested exclusively in the courts of the District of Columbia Circuit (35 U.S.C. 11). Moreover, strict enforcement of high standards of ethics upon the practitioners is imperative in Patent Office pro-

ceedings. Because of the secrecy surrounding pending applications in order to prevent premature disclosure, the Patent Office frequently has no choice but to accept representations as true and thereby is compelled to rely upon the complete integrity and honesty of the applicants and their representatives. See R. 38-89. In addition, since patents constitute "an exception to the general rule against monopolies and to the right to access to a free * * * market" (*Precision Instrument Co.* case at 816), the possession and assertion of patent rights are "issues of great moment to the public." *Hazel-Atlas* case at 246; *Precision Instrument* case, *ibid.* In these circumstances, the refusal below to give effect to these standards deprives the Patent Office of the most effective means available with which "to safeguard the public in the first instance against fraudulent patent monopolies," and makes it extremely difficult, if not impossible, for that Office to protect itself and the public "from being classed among the 'mute and helpless victims of deception and fraud.' *Hazel-Atlas Glass Co., supra*, 246." *Precision Instrument Co.* case at 818; cf. *Federal Communications Commission v. WOKO*, 329 U. S. 223.

4. A reading of the opinion below will, we submit, demonstrate that this is an appropriate case for the exercise of the supervisory authority of this Court.

CONCLUSION

For these reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

PHILIP B. PERLMAN,
Solicitor General.

APRIL, 1949

APPENDIX

Additional excerpts from testimony before the Patent Office's Committee on Enrollment and Disbarment:

* * * * *

Tr. 16-18

Mr. Brown [Special Assistant to the Secretary of Commerce]: I don't think we need to argue the matter at great length. I would like to say just a little bit more about our position. The feeling on this side of the table is that a rule to show cause has been entered, and that the burden is on the Respondents to come in and show why they should not be disbarred. That is the issue that we want to present here, and it might as well be presented now. We think that all these decisions, and the record on which the *Hazel-Atlas v. Hartford-Empire* case was decided in the Supreme Court, are necessarily before you to be considered. These gentlemen are here, and certainly so far as I am concerned, so far as I know, the policy we conceive is this: There will be no objection to their answering them, contravening, disputing them, but the Patent Office cannot ignore the findings of Courts that have been made where substantially the same issues, except the guilt of these particular individuals, were tried and were decided.

I think you are bound to receive those records, subject, of course, to any argument as to materiality, relevancy or binding effect.

Mr. Goodrich [counsel on behalf of defendants Brown and Hatch]: The burden is on the

Respondents. All right. We will take it. We are here for that purpose, to meet that burden. We want to meet it in an orderly, legal way, according to the rules of procedure, and the issues here are not the same, gentlemen, as they were in those cases, as Mr. Brown said. The issues in those cases were against Hartford, the issue at Toledo was whether Hartford was guilty of violation of the Anti-Trust Act and the issue in Philadelphia in the Hazel case was whether there was such newly discovered evidence as the Defendants claimed, that the decree entered in 1932 should be reopened on the grounds of newly discovered evidence.

That charge the Third Circuit Court of Appeals, under the circumstances, took as being the equivalent of a charge of fraud on that Court because of the Clarke article to which Judge Buffington referred in his opinion, but the issue was a very narrow issue of procedure, namely whether the Court had the power to reopen its decision entered ten years before, and whether there was newly discovered evidence which would justify such an unusual course.

The Circuit Court took that case to itself and considered it itself, because had there been fraud it would have been on the Third Circuit Court. Now, it considered that case on its merits and it found for Hartford. While it disapproved of the ghost-writing, it said that article worked no fraud on this Court, and there is no newly discovered evidence here, because the facts pertaining to the authorship and publication of that article were known to

those parties and to this Court in 1932 or before. That was a decision on the merits by the Third Circuit Court. That decision was reversed by the Supreme Court, again on a truncated record. The story these Respondents must tell you has never been told, and we want to come in and put a clean record before you, make it from the start. I don't care what your charges are based on. You found reasonable grounds to bring them. We are here to answer.

* * * * *

Tr. 19

Mr. Wood [counsel for defendant Carter]: Mr. Carter was not in any way connected with the Hazel-Atlas litigation, as an attorney or witness. He had no part in it whatsoever. The Owens-Illinois Glass Company had no place in the litigation and was not a party to the litigation. Mr. Carter had absolutely no standing in that matter which would have given him opportunity to say anything. I am told that at the hearing in the Supreme Court he was so outraged by what was going on that his friends had to restrain him from interfering and making a statement on his own behalf. He had no right to make a statement, and did not make one, and this is his first opportunity to do anything on his own behalf.

Mr. Dorsey: I want to fortify what Mr. Wood said. After the hearing in the Supreme Court, and after the decision, Mr. Carter took up with me whether we, who were outsiders in the whole matter, had any right whatever or any opportunity to present our case to the

Court, and we reached the conclusion there was no redress for us until charges were preferred, when we would have a chance to answer. Therefore, I welcome these charges.

* * * * *

Tr. 60-61

The Chairman: Shall we go ahead with our proof? I was going to ask if there was any objection to our combining and making a consolidated record.

Mr. Dorsey: Except, your Honor, I would like my testimony to come in by itself, because it is such a small part of the enormous picture. I would like an opportunity to present my case by itself anywhere in their case that it fits in.

Mr. Goodrich: May we work that out?

The Chairman: Yes.

Mr. Goodrich: I am sure we can adjust that between us.

Mr. Brown: Mr. Dorsey, the testimony of these other men so far as it affects you will be part of your case.

Mr. Dorsey: Yes, but so far as I know they can't say anything about me, because I didn't see them.

Mr. Brown: But if there is anything about you—

Mr. Dorsey: Oh, yes; it is sworn testimony, and I have an opportunity to cross-examine.

Mr. Goodrich: I think we all understand that although we have four cases here, there will be but one record.

The Chairman: Yes.

* * * * *

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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 53

**LAWRENCE C. KINGSLAND, COMMISSIONER OF
PATENTS, PETITIONER**

v.

VERNON M. DORSEY

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT**

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The findings and opinion of the District Court of the United States for the District of Columbia (R.¹ 14-35) are reported at 69 F. Supp. 788.

¹ The entire transcript of record of the proceedings before the Patent Office consisting of three printed volumes of testimony and exhibits plus several separately printed Exhibit volumes was in the record before the courts below and has been certified to this Court. By stipulation of counsel, only the joint appendix and excerpts from the evidence before the Patent Office's Committee on Enrollment and Disbarment have been reprinted in the record here and will be referred to as R. —. The portions of the transcript of the record before the Patent Office which have not been reprinted and to which the parties are free to refer (R. 91), will be referred to as Tr. —, or in the case of a separately printed Exhibit as Ex. —.

The opinion of the United States Court of Appeals for the District of Columbia Circuit (R. 69-84) is reported at 173 F. 2d 405.

JURISDICTION

The judgment of the Court of Appeals was entered on January 26, 1949 (R. 84-85). The petition for a writ of certiorari was filed on April 15, 1949, and was granted on May 31, 1949 (337 U. S. 914, R. 87). The jurisdiction of this Court rests upon 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the standards of ethical conduct for practice before the Patent Office approved by this Court in *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U. S. 238, were binding on the court below in reviewing an order of the Commissioner of Patents which barred respondent from practice before the Patent Office.

2. Whether there was sufficient evidence in the record before the Commissioner of Patents to support his order barring respondent, one of Hartford's attorneys, from practicing before the Patent Office on the ground that he had participated in perpetration of the fraudulent scheme specifically condemned by this Court in the *Hazel-Atlas* case.

3. Whether there was any denial of due process of law in the proceedings leading up to the Commissioner's order barring respondent from practice before the Patent Office.

STATUTE INVOLVED

35 U. S. C. 11 reads as follows:

The Commissioner of Patents, subject to the approval of the Secretary of Commerce, may prescribe rules and regulations governing the recognition of agents, attorneys, or other persons representing applicants or other parties before his office, and may require of such persons, agents, or attorneys, before being recognized as representatives of applicants or other persons, that they shall show that they are of good moral character and in good repute, are possessed of the necessary qualifications to enable them to render to applicants or other persons valuable service, and are likewise competent to advise and assist applicants or other persons in the presentation or prosecution of their applications or other business before the Office. The Commissioner of Patents may, after notice and opportunity for a hearing, suspend or exclude, either generally or in any particular case, from further practice before his office any person, agent, or attorney shown to be incompetent or disreputable, or guilty of gross misconduct, or who refuses to comply with the said rules and regulations, or who shall, with intent to defraud in any manner, deceive, mislead, or threaten any applicant or prospective applicant, or other person having immediate or prospective business before the office, by word, circular, letter, or by advertising. The reasons for any such suspension or exclusion shall be

duly recorded. The action of the commissioner may be reviewed upon the petition of the person so refused recognition or so suspended or excluded by the district court of the United States for the District of Columbia under such conditions and upon such proceedings as the said court may by its rules determine.

STATEMENT

A. *Background.*—Vernon M. Dorsey, respondent herein, is an attorney who during the period covered by the facts here involved was patent counsel in charge of the prosecution of some of the more important patent applications—including the Peiler application—under associate powers of attorney for Hartford Empire Company (R. 115, 161). He was a member of Hartford's Board of Directors (R. 41). He was not merely local counsel, as he now seeks to imply. (Br. in opp. 12.)

The July 17, 1926, issue of the National Glass Budget, a trade publication in the glass industry, contained an article entitled "Introduction of Automatic Glass Working Machinery; How Received by Organized Labor, by William P. Clarke, President, American Flint Glass Workers Union." The attorneys for Hartford-Empire Company filed a copy of this article, accompanied by a letter of transmittal signed by Dorsey, along with other things in the Patent Office on October 11, 1926, as an appendix to the supplemental

amendment to Hartford's Peiler application No. 294,792 (Ex. E, pp. 303-5). That application, which had been filed on May 5, 1919, sought a patent for a method of and apparatus for feeding molten glass. (R. 48-49, Ex. HB-61, R. 151-154.) At the time this supplemental amendment was filed, the claims in the application had been rejected once by the Primary Examiner. After the second and final rejection of the claims by the Primary Examiner, the Clarke article was reprinted in the Appendix to a brief, signed by Dorsey and Robson D. Brown, and was urged, *inter alia*, upon the Office's Board of Appeals as the recognition by a reluctant witness of the tremendous success of Hartford's feeders (R. 143, Ex. E, pp. 477-478, 509, 593-605). The Board of Appeals affirmed the Examiner's holding that the claims were unpatentable over the prior art (Ex. E, pp. 684-691). At rehearing, in connection with which a brief signed by Dorsey was filed, the Examiner was reversed and the claimed invention held patentable with respect to all but two claims. Patent No. 1,655,391 (Peiler patent) was issued on January 3, 1928 (Ex. E, pp. 732-734). In the subsequent patent infringement litigation with Hazel-Atlas Glass Company over this patent, the Clarke article was cited in Hartford's brief in the Third Circuit Court of Appeals and quoted extensively by Judge Buffington in his opinion in 1932, holding (Judge Woolley dissenting) that the Peiler patent was valid

and had been infringed. *Hartford-Empire Co. v. Hazel-Atlas Glass Co.*, 59 F. 2d 399. See, also, *Shawkee Mfg. Co. v. Hartford-Empire Co.*, 68 F. 2d 726 (C. A. 3).

In the course of the Government's antitrust proceeding against Hartford begun in 1939 in the United States District Court for the Northern District of Ohio, Western Division, the fact was brought to light that the Clarke article had been written by an employee of Hartford, named Hatch, who had persuaded Clarke to sponsor the article, for the purpose of filing it with the Patent Office as the views of an apparently unprejudiced and reluctant witness. *United States v. Hartford-Empire Co.*, 46 F. Supp. 541, 612 (N. D. Ohio). Based on the information thus disclosed, Hazel-Atlas and Shawkee Mfg. Co. petitioned the Court of Appeals for the Third Circuit to vacate and set aside its prior judgments on the ground of fraud. That court, while it described the "story" as "sordid" and named four men, including Dorsey, as participants in the fraudulent scheme, held that it was without power to reopen its judgment. *Hartford-Empire Co. v. Hazel-Atlas Co.*, 137 F. 2d 764, 766. This Court, in reversing, was unanimous in its condemnation of the Clarke transaction as fraudulent. *Hazel-Atlas Co. v. Hartford-Empire Co.*, 322 U. S. 238, 245-246, 251.

B. The Disbarment Proceeding.—On October 11, 1944, shortly after this Court's denial of re-

hearing in the *Hazel-Atlas* case (322 U. S. 772), the Commissioner of Patents issued separate orders to Dorsey, Hartford's Washington patent attorney (see *supra*, p. 4), Roswell F. Hatch, Robson D. Brown, employees of Hartford, and Henry W. Carter, an official of Owens-Illinois Bottle Company (the four men named in the Third Circuit's opinion as the perpetrators of the fraud) to show cause why each should not be suspended or excluded from further practice before the Patent Office for gross misconduct as a result of their activities in this transaction (R. 9-10). In the order, the Commissioner set November 9, 1944, as the date for hearing before his Committee on Enrollment and Disbarment, and charged that it appeared from the records in the *Hazel-Atlas* and antitrust cases that each of these men—

* * * participated in the preparation of [the Clarke] article and/or the presentation thereof to the United States Patent Office during the prosecution of said patent application knowing that said article was not written by said William P. Clarke, and with the purpose of deceiving the Patent Office as to the authorship of said article and influencing the action of the Patent Office on said application * * *

In accordance with the show cause orders, a hearing was held beginning on November 21, 1944, before a Committee on Enrollment and Disbarment composed of seven Patent Office officials.

The case on behalf of the Patent Office consisted solely of the official records in the *Hazel-Atlas* and the antitrust case, which were introduced as the basis for the show cause orders, and as evidence for the limited purpose of proving against each respondent admissions and letters and documents written or received by that respondent (R. 41, 106-107). Thereafter, all of the respondents testified and called and examined witnesses. At the close of the hearing, time was granted to file briefs, after which oral argument was heard by the Committee, with the Commissioner sitting in (R. 16). On April 26, 1945, the Committee submitted a report to the Commissioner setting out its findings which may be briefly summarized as follows (R. 36-68):

C. Committee's Findings.—In the latter part of 1925, Carter discussed with Brown, who in turn discussed with Dorsey, their interest in having an article prepared and signed by "some competent authority and placed before the Examiner" relating to gob feeders for filing in the Peiler application (R. 42, 117, 123-124). Shortly thereafter, Hatch, who reported to, and consulted with, Brown as his superior officer in Hartford, commenced the preparation of an article relating to automatic glass machines, which was completed early in 1926. (R. 42). The principal object of the article admittedly was to make a comparison "between the commercial success of the Owens suction machine and feeders of the gob type"

(R. 42-43, Tr. 531). In the preparation of the article, Hatch consulted both Dorsey and Carter as well as the Reports of the Annual Conventions of the Glass Bottle Blowers Association (a labor union) and various other publications. (R. 42-43, 124, 125.) As finally drafted by Hatch, the article quotes extensively from these reports in order to provide "bait" to induce a labor leader named James Maloney who was President of the Glass Bottle Blowers Association to sign the article (R. 43, 150 (Ex. D-72-C)). Carter was fully informed about these matters, and severely criticized the accuracy of the article and suggested important changes therein (R. 44, Tr. 745, Ex. C-70-3), but Hatch indicated that he had "prepared this article so far as possible with reference only to the proceedings of The Bottle Blowers Association, and knowingly and intentionally I reproduced some of the errors found therein" (R. 44, 148 (Ex. C-70-4), D. Ex. B, p. 40). Brown was likewise informed and he authorized Hatch to go ahead (R. 45, Tr. 356, 417, 418, 474).

Dorsey was also provided with a manuscript copy of the article (R. 126, 132-133). Dorsey made two or three minor corrections in the manuscript and returned it to Hatch (R. 45, 125). Dorsey knew that Hatch intended to ask Maloney to sign the article, and stated that he desired a copy when signed for filing in the Peiler application (R. 45, 133-134, 138-139). Subsequently,

he wired Hatch for a copy (R. 45, 140). In his response of May 20, 1926,² apparently enclosing a copy of the article, Hatch informed Dorsey that Maloney had refused to sponsor the article; that Clarke had "swallowed the labor bait" and that while he would probably change it considerably, "I think he understood just what we want published, but he might unintentionally destroy some of the propaganda which we planned. I will see that you get a copy of some Journal in which this article appears when it comes out." (R. 45-46, 149-150 (Ex. D-72-C).)

In the course of obtaining clearance from Owens, Carter, on May 25, 1926, addressed a memorandum to W. H. Boshart, its President, in which he said in part (R. 48, Tr. 763 (Ex. C-70-7), D. Ex. B, p. 41):

It occurs to me that I should make myself more clear about the purpose of the Hatch article.

He has prepared it with the idea of getting it printed under the name of some apparently unprejudiced authority, and then calling the attention of the Patent Office Examiner to the article as published, in the belief that the Examiner will thereby be influenced to a more favorable consideration of Hartford's broad claims.

Under the circumstances, I do not see that we need be very critical in our treat-

² The letter is reproduced more fully *infra*, pp. 31-32.

ment of the article. If not too rank, would say that we better let it go through. Of course any particular statements can be corrected or cut out.

Owens thereupon agreed to the publication of the article. Immediately upon receiving, in addition, the consent of Maloney which he desired, Clarke on July 7, 1926, telegraphed Hatch that he would "sponsor article with very slight alteration and modifications" (R. 48, Tr. 778 (Ex. HB-10), D. Ex. B, p. 132). Clarke signed the article some time the next day and handed it to Hatch, who was then in Philadelphia (R. 48). Hatch forwarded the article without delay to the editor of the National Glass Budget requesting that it be published promptly and advising him that Clarke would "not insist on seeing a proof if it is going to take extra time" (R. 48, Tr. 543). The article appeared in the July 17, 1926, issue of the National Glass Budget (R. 48-49). Dorsey requested a copy of the article (R. 50, 134), and a copy as printed was presented by Dorsey and Brown to the Patent Office as part of the October 11, 1926, amendment in the Peiler application (R. 52-53). The Committee noted that from the standpoint of practice, the filing of this amendment was timely since the Examiner was on the verge of finally rejecting all of the claims in the application (R. 52). Later, Dorsey and Brown also referred to the article in a brief filed with the Board of Appeals, as indicated *supra*, p. 5.

The Committee went on to describe Hartford's payment of \$8,000 to Clarke shortly after the decision of the Court of Appeals for the Third Circuit which quoted extensively from the article (R. 54-60). These events occurred nearly six years after the filing of the article and, as the Committee noted, "cast their light backwardly on the activities of the parties during the time of preparation and filing of the Clarke article, giving added illumination with regard to the purposes, understandings, and intentions of [defendants] at that time" (R. 54-55). The Committee noted that Dorsey did not participate in these events (R. 55).

Based on these findings, the Committee was unanimously of the opinion that the record conclusively established that (R. 66)

* * * in the perpetration of such concealment all of the respondents deliberately collaborated not only with each other but also directly or indirectly with Clarke, and that all of the respondents connived with each other with the intention of misleading and deceiving the officials of the Patent Office as to the true state of the said material facts concerning the connection of Hartford with the preparation and publishing of the article with Clarke's name appearing thereon as the author thereof, when in fact he was not the true author thereof, and all this for the purpose of securing favorable action by the Patent

Office with respect to the claims in the Peiler application.

Five members of the Committee accordingly recommended to the Commissioner that respondents be disbarred from further practice before the Patent Office; the remaining two members recommended suspension for a definite period of time (R. 67). The Commissioner, on May 18, 1945, ordered the disbarment of all four respondents (R. 10-11).

D. Court Review.—Three of the respondents³ sought review of these orders in the United States District Court for the District of Columbia in accordance with 35 U. S. C. 11. The District Court, after hearing extensive argument lasting five days, affirmed the Commissioner's order (R. 14-35). Commenting that in such proceedings its function was limited to a determination whether a fair hearing had been had after due notice of the charges and whether there was substantial evidence to support the Commissioner's action (R. 18), the court held that the charges in the show cause orders were sufficient basis to sustain the Commissioner's action and sufficiently apprised defendants of the matters they were called upon to answer, and that there was substantial evidence in the record here to support the Commissioner's action. This conclusion was reached after a de-

³ The fourth, Robson D. Brown, died in the period between the Commissioner's order and the filing of the petition for review.

tailed review of the evidence in the record as to the preparation and filing of the Clarke article, and after referring to the events occurring thereafter "only as they may throw light upon the acts of the petitioners and their intent with respect to the Clarke article" in regard to the proceedings before the Patent Office (R. 25). On the appeal to the court below taken only by respondent, the judgment of the District Court was reversed by a divided court. Judge Clark delivered the opinion in which Judge Miller concurred (R. 69-83). Judge Edgerton dissented in a separate opinion (R. 83-84).

SUMMARY OF ARGUMENT

I

A. The court's holding that the preparation and filing of the so-called Clarke article did not involve fraud upon the Patent Office is grounded primarily on a disagreement with this Court as to what constitutes fraud upon an administrative agency. Its view that the test of fraud should be the truth or falsity of the article is in square conflict with this Court's flat rejection of that very contention in the *Hazel-Atlas* case. Its castigation of the Patent Office for relying on the article ignores this Court's refusal to consider as relevant the materiality of the misrepresentations. "The fact of concealment" this Court noted in *Federal Communications Commission v. WOKO, Inc.*, 329 U. S. 223, 227, "may be more significant than the facts concealed." When the record here is viewed

in the light of this Court's standards, it clearly supports the Commissioner's conclusion that the Clarke transaction was fraudulent.

B. There was ample evidence to connect Dorsey with the fraud. The evidence on which the Commissioner's conclusion is based consists principally of affidavits and evidence introduced by Dorsey himself. Dorsey admits that he had made changes in the article when it was presented to him for revision; that long before the article was printed, he intended to use it when printed in connection with the proposed amendments to Hartford's Peiler application; and that when he filed the article, he was aware of the connection between the article as published and as prepared by Hatch. Nevertheless, he concededly never disclosed the true facts to the Patent Office, but described the article in his brief as that of a "reluctant witness." This evidence, we believe, conclusively demonstrates Dorsey's knowing participation in the fraud.

C. Since the evidence conclusively shows that Dorsey had participated in the perpetration of the fraud on the Patent Office, the disposition of the case does not depend upon the scope of judicial review under 35 U. S. C. 11. Nevertheless, we submit that dissenting Circuit Judge Edgerton and District Judge Morris were correct in holding the substantial evidence rule applicable. The statute here does not define the scope of review, and the normal inference would be that

Congress meant the traditional test applied in reviewing administrative action generally to govern. The substantial evidence test has long been applied by this Court when the scope of review has not been statutorily defined, in the absence of any specific statutory provision to the contrary.

Interstate Commerce Commission v. Louisville & N. R. R., 227 U. S. 88, 92; *Shields v. Utah Idaho Central R. Co.*, 305 U. S. 177. The test has recently been approved by Congress for general application in Section 10 (e) of the Administrative Procedure Act. Even if the substantial evidence rule is not controlling, the findings of the Patent Office officials who heard the evidence must be given great weight, and not set aside unless clearly erroneous. The "clearly erroneous" rule contained in Rule 52 (a) of the Rules of Civil Procedure embodies the long-established practice of the courts in recognizing the advantage in finding facts of the tribunal which actually sees and hears the witness. The court below erred in failing to give this factor any weight. And even if the record be viewed entirely *de novo*, without regard for the administrative findings, the evidence conclusively establishes Dorsey's gross misconduct and justifies the order barring him from practice before the Patent Office.

II

A. Dorsey was accorded a fair hearing before the Patent Office. Consolidating Dorsey's case

with that of the other respondents involved no deprivation of due process, for the record on its face shows clearly Dorsey's explicit consent to the consolidation. At no time in the proceedings before the Patent Office or thereafter has he questioned the propriety of this consolidation. And even in the absence of express consent, consolidation in the interest of trial convenience for the making of the joint record would have been proper.

The record equally clearly reveals that the burden of proving innocence was not imposed upon Dorsey. All that happened was that the burden of going forward with evidence was shifted to respondents as a result of a *prima facie* case made by the introduction into the record of material in the records in the *Hazel-Atlas* and antitrust cases. This burden was voluntarily accepted by them. In any case, the question is immaterial since the record conclusively showed Dorsey's gross misconduct.

B. Nor is there any substance to the holding below that Dorsey was not given adequate notice of the matters for which he was ordered disbarred. There actually was no discrepancy between the charge in the show cause order as to the representation of authorship of the Clarke article and the finding of guilt in that respect. The difference relied on by the court merely amounted to different formulations of the same thing. Moreover, even if there had been a dis-

crepancy, there would be no deprivation of due process, for disbarment proceedings are civil, not criminal, in nature and the notice given need not spell out the charges with the specificity of a criminal indictment. Informal notice of the charges is sufficient.

Dorsey's disbarment was not predicated on participation either in the use of the Clarke article in the Court of Appeals for the Third Circuit, or in Hartford's payment of \$8,000 to Clarke in 1932, since he was found not to have participated in those events. The Committee's discussion of these matters explicitly noted that they were referred to only for the light they cast on respondents' conduct in regard to the filing of the Clarke article in the Patent Office.

Although the order to show cause did not charge explicitly a misrepresentation of the contents of the Clarke article to the Patent Office, that point arose during the course of the same transaction as the misrepresentation as to authorship and was fully explored in the evidence, largely at the instance of respondents' counsel. The basic evidence consisted of the same documents involved in the other misrepresentation. Dorsey was given a full opportunity to explain his conduct in this respect. Accordingly it was not improper for the Patent Office to conform its findings to the evidence. Compare Federal Rules of Civil Procedure, 15 (b), 54 (c). In any event the disbarment was fully supported by the finding as

to fraudulent concealment of the authorship of the article.

III

The 18-year interval between the Clarke transaction in 1926 and the issuance of the show cause order in 1944 does not invalidate Dorsey's disbarment. There is no statute of limitation applicable, as Dorsey has conceded. Nor was the Commissioner guilty of laches in issuing the order. The fraud was successfully concealed for thirteen years and brought to light in the course of the Government's antitrust proceedings against the Hartford-Empire Company. The Commissioner of Patents acted promptly after the final termination of the *Hazel-Atlas* case. *In re Adriaans*, 28 App. D. C. 515, relied on below is distinguishable.

ARGUMENT

I

DORSEY WAS PROPERLY DISBARRED FROM PRACTICE BEFORE THE PATENT OFFICE FOR PARTICIPATING IN THE FRAUD PERPETRATED ON THAT OFFICE IN CONNECTION WITH THE CLARKE ARTICLE

The statute (35 U. S. C. 11) authorizes the Commissioner of Patents to "exclude * * * from further practice before his office any * * * attorney shown to be incompetent or disreputable, or guilty of gross misconduct". In the present case Dorsey was found to have been guilty of gross misconduct (R. 66, 10-11) for participating in what this Court has described as "a scheme to defraud not only the Patent Office but the Circuit Court of Appeals." *Hazel Atlas*

Co. v. Hartford-Empire Co., 322 U. S. 238, 245-246. Although the statutory test of "gross misconduct" may impose upon attorneys practicing before the Patent Office more stringent standards of behaviour than the avoidance of fraud, there can be no question that a scheme to defraud the Patent Office would be such misconduct as would warrant revoking the privilege of practicing before that Office.

The conclusion of the court below that the disbarment order was not supported by the evidence in the record is based upon several errors. Its holding that there was no fraud involved in preparing the Clarke article and presenting it to the Patent Office was based on standards squarely in conflict with those prescribed by this Court's recent decisions, particularly the *Hazel-Atlas* case which involved this very same transaction. In addition, the court erred in holding that the evidence in the record does not show that Dorsey participated in that transaction. On the contrary the evidence conclusively shows that Dorsey was a knowing and willing participant.*

* An additional ground of the action below was that there was no evidence to support the charges (for which the court below found Dorsey had been disbarred), that he had participated in the use of the Clarke article in the litigation before the Court of Appeals for the Third Circuit and in the payment of \$8,000 by Hartford to Clarke in 1932. We do not discuss whether there was any evidence in regard thereto, for as we point out (*infra*, pp. 67-70), Dorsey was not charged with having participated in these matters, nor was he disbarred on any such ground.

A. THE CLARKE TRANSACTION INVOLVED FRAUD UPON THE PATENT OFFICE

The holding below, that there was no fraud on the Patent Office involved in preparing the Clarke article and filing it with the Patent Office, indicates a clear disagreement with this Court's decisions as to what constitutes fraud. "We do not believe," the court stated, "that Dorsey was guilty of any dereliction of his duty as a member of the Patent Bar by his failure to make known the exact contribution of several people to the preparation of the article, even if he had known it. The test should have been the truth or falsity of the facts set out in the article and we do not understand that the truth of these statements has been called into question in any quarter" (R. 80). It also held that the finding of fraud was improper because the Patent Office should not have relied on the article. It regarded this reliance as being a dereliction of that office's duty "to investigate these matters for itself, * * * and not to shift the burden of its own responsibilities to a blind reliance on some article presented from some trade journal, which with ordinary intelligence it might have known to be self-serving for the party offering it" (R. 71-72).

These statements ignore completely the controlling decisions of this Court,⁵ particularly the

⁵ The court below did not, in its discussion of these questions, refer to any of these decisions although the Commissioner, in his brief, relied on these cases and discussed them at length.

Hazel-Atlas case which involved the propriety of this very transaction. In the *Hazel-Atlas* case, *Hazel-Atlas* was seeking to have vacated a judgment entered in 1932 by the Court of Appeals for the Third Circuit against it in favor of Hartford sustaining the Peiler patent. The basis of the *Hazel-Atlas* petition was that Hartford had perpetrated fraud upon the Patent Office and the Court of Appeals in connection with the so-called Clarke article. Hartford there urged upon this Court, in line with the holding below here, that the Clarke article was in fact true, and hence that its failure to disclose that its employees had prepared the article was immaterial. See Brief for Respondent in No. 398, October Term, 1943, pp. 43-47. This Court flatly rejected that contention: "Neither should they now be permitted to escape the consequences of Hartford's deceptive attribution of authorship to Clarke on the ground that what the article stated was true. Truth needs no disguise. The article, even if true, should have stood or fallen under the only title it could honestly have been given—that of a brief in behalf of Hartford, prepared by Hartford's agents, attorneys, and collaborators." 322 U. S. at 247.*

* The District Court's opinion pointed out in this connection (R. 33): "The truth of the statements in the Clarke article was not an issue in these proceedings. It was expressly stated during the course of the hearings that it was not. Even though the article contained no mistakes or false statements, its weight as evidence depends as much upon its origin as its content."

Likewise, this Court in the *Hazel-Atlas* case refused to appraise the influence exerted by the Clarke article or whether the Patent Office could properly have relied on it. The critical point, this Court stated, was that "Hartford's officials and lawyers thought the article material. They conceived it in an effort to persuade a hostile Patent Office to grant their patent application, and went to considerable trouble and expense to get it published. * * * They are in no position now to dispute its effectiveness." 322 U. S. at 247. Moreover, in *Federal Communications Commission v. WOKO, Inc.*, 329 U. S. 223, this Court even more pointedly stressed the irrelevance of reliance upon fraudulent matters. In that case, where the Commission had refused to renew a license to operate a radio station because of false statements as to ownership of the stock, it similarly was urged that "the Commission failed to find that the concealment was of material facts or had influenced the Commission in making any decision, or that it would have acted differently" had it known the true facts. 329 U. S. at 226-227. The Court, however, brushed this contention aside as "beside the point. The fact of concealment may be more significant than the facts concealed. The willingness to deceive a regulatory body may be disclosed by immaterial and useless deceptions as well as by material and persuasive ones. We do not think it is an answer to say that the deception was unnecessary

and served no purpose." 329 U. S. at 227. See, also, *Federal Communications Commission v. Broadcasting Service Organization, Inc.*, 337 U. S. 901.¹

It would be singularly undesirable if the test of fraud on the Patent Office revolved about the materiality of the misrepresentations involved. In the first place, in order to protect applicants, proceedings in the Patent Office are necessarily secret and consequently the Office has to be able to rely upon the integrity of the representations made by applicants and practitioners before it. In the second place, patents constitute "an exception to the general rule against monopolies and to the right to access to a free * * * market" (*Precision Instrument Co. v. Automotive Co.*, 324 U. S. 806, 816), and hence the possession and assertion of patent rights are "issues of great moment to the public." The *Hazel-Atlas* case, 322 U. S. at 246; *Precision Instrument Co. v. Automotive Co.*, *ibid.* See also, *Mercoird Corp. v. Mid-Continent Investment Co.*, 320 U. S. 661, 665; *Morton Salt Co. v. Suppiger Co.*, 314 U. S. 488, 492-493; *United States v. Masonite Corp.*,

¹ The failure of the court below in this case to accord precedential effect to principles laid down by this Court in the *Hazel-Atlas* case is even more marked than its action in the *Broadcasting Service* case, 171 F. 2d 1007, which was reversed *per curiam* by this Court. 337 U. S. 901. The *Hazel-Atlas* case, which established the applicable principles ignored by the court below, concerned the same transaction as here involved, not merely a similar set of facts.

316 U. S. 265, 278. Because of the exceptional nature of patents there is an uncompromising duty on all applicants and parties to Patent Office proceedings "to report to it all facts concerning possible fraud or inequity underlying the applications in issue." *Precision Instrument Co. v. Automotive Co.*, *supra*, at 818.* It is only by the imposition of such a rigid standard of honesty and integrity that that agency can "act to safeguard the public * * * against fraudulent patent monopolies. Only in that way can the Patent Office and the public escape from being classed among the 'mute and helpless victims of deception and fraud.' *Hazel-Atlas Glass Co. v. Hartford Empire Co.*, *supra* 246." *Precision Instrument Co. v. Automotive Co.*, *ibid.*; cf. *Federal Communications Commission v. WOKO*, 329 U. S. 223.

The Commissioner's conclusion that the use of the Clarke article was fraudulent is the same as that of all courts—indeed all judges—other than the majority below, which have had this very transaction before them. *Hazel-Atlas* case, 322

* In the *Precision Instrument* case an applicant for a patent failed to disclose to the Patent Office his information as to possible perjury in an application to which he was opposed in an interference proceeding. Instead, he entered an agreement with the opposer, in which the opposer conceded priority and assigned his application. This Court refused to enjoin infringement of the patents so obtained, since the patentee had not displayed the requisite standard of conduct. 324 U. S. at 819.

U. S. at 245-246, 250; * 137 F. 2d 764, 766, 770 (C. A. 3); *United States v. Hartford-Empire Co.*, 46 F. Supp. 541, 612 (N. D. Ohio). The evidence before the Commissioner included the same documentary material which was before the courts, and no credible oral testimony which weakened the force of the documents. Obviously, the Commissioner did not err in accepting the standards enunciated in these decisions. The court below was under an equal duty to follow them.

B. THE EVIDENCE CONCLUSIVELY SHOWS THAT DORSEY PARTICIPATED IN THE FRAUD

Although the Commissioner—and the court below—were both bound by this Court's pronouncements as to what constituted fraud, he was required to base his findings as to the parties'

* The total effect of this "deliberately planned and carefully executed scheme to defraud not only the Patent Office but the Circuit Court of Appeals" (322 U. S. 245-246), this Court stated, "calls for nothing less than a complete denial of relief to Hartford for the claimed infringement of the patent thereby procured and enforced." 322 U. S. at 250. The Court went on (322 U. S. at 251):

"To grant full protection to the public against a patent obtained by fraud, that patent must be vacated. * * * such a remedy is not available in infringement proceedings, but can only be accomplished in a direct proceeding brought by the Government."

Pursuant thereto, the Government has brought proceedings to cancel the Peiler patent. *United States v. Hartford-Empire Co.*, Civil Action No. 554, D. Del., filed March 28, 1945. With Hartford's consent, the District Court for the District of Delaware, on July 22, 1949, entered a judgment ordering Hartford to surrender the patent for cancellation *ab initio*.

participation in the fraud upon the evidence before him. This obligation he recognized (R. 41, 11)."

Although the majority of the court below was of the opinion that there was not "a shred of evidence" to support the Commissioner's finding that Dorsey was a knowing participant in the fraudulent scheme (R. 72), the evidence before the Commissioner was in substance identical with that on the basis of which both the Court of Appeals for the Third Circuit in the *Hazel-Atlas* case (137 F. 2d 764, 766, quoted at R. 38-39), and the district court in the antitrust case (*United States v. Hartford-Empire Co.*, 46 F. Supp. 541, 612, quoted at R. 39-40), had declared that Dorsey had participated in the fraudulent scheme. Judge Edgerton, dissenting below, thought that the proof as to Dorsey was "conclusive" (R. 84), and District Judge Morris held that there

¹⁰ "Although the question of fraud and deception by Hartford was in issue and a matter adjudicated in the cases mentioned in the orders to show cause, the respondents here were not parties individually in any of those cases and their personal guilt or innocence in connection with fraud chargeable to Hartford was not a direct issue in any of the cases.

"Accordingly, the proceedings here were conducted as an original proceeding, placing in direct issue for the first time the questions of personal fraud and deception stated in the orders to show cause, and with full and complete opportunity accorded respondents, and each of them, to introduce any pertinent and relevant testimony and proofs they saw fit to introduce, and each respondent was accorded the right to cross-examine any and all witnesses called on behalf of any of the other respondents." (R. 41-42.)

was "ample and substantial" evidence to support the Commissioner's findings as to Dorsey's participation in the fraud (R. 32). We believe that the evidence set forth at length in the findings of the Committee (see *supra*, pp. 8-12; R. 36-68 *et seq.*) and in Judge Morris' opinion (R. 14-36 *et seq.*) proves this conclusively. It may be summarized as follows:

Dorsey was Hartford's Washington patent attorney as well as a member of the Hartford Board of Directors (R. 114, 115, 41). He was in charge of the prosecution of some of the more important of its patent applications under associate powers of attorney with Mr. William H. Honiss, who was Hartford's regular solicitor (R. 114-115). In 1925 Dorsey was working closely with Brown and Carter on a number of patent applications.¹¹ Included among these applications was the Peiler application which was "one of the principal ones we had" (R. 116).

At that time, discussions were had, in which Dorsey participated (R. 42, 116-117), as to the

¹¹ Brown testified (R. 123):

"Q. Mr. Brown, during the years 1925 and 1926, is it not a fact that you and Mr. Dorsey and Mr. Carter were in frequent conference about the patent situation of the Hartford-Empire Company and the Owens-Illinois Company?

"A. We had a great many conferences; yes.

"Q. And you were working in close cooperation during these years, were you not, on the patent situation?

"A. From time to time; Mr. Dorsey and I were together a good deal of the time. I probably spent two-thirds of my time in Washington during that period."

desirability of having an article prepared and signed by "some competent authority and placed before the Examiner" relating to gob feeders for filing in the Peiler application (Tr. 600). Brown, in December 1925, initially asked Carter, an official of Owens Illinois Bottle Company (whose full interest in Hartford's commercial welfare was at that time secret), to prepare the article "to be signed either by [him] or someone else" but Carter declined (Tr. 743 (Ex. C-70-1), Tr. 744 (Ex. C-70-2)). Shortly thereafter (early in January 1926) Hatch, who reported to and consulted with Brown as his superior officer in the Hartford organization on matters of policy affecting patents, commenced, with Brown's approval, the preparation of an article relating to automatic glass machines (Tr. 538, 474).

While Hatch did the major portion of the actual work, he consulted with Dorsey, among others, and he sent him a copy of the manuscript when he had completed it (R. 126-127). Dorsey admits that he read the article and that he suggested at least two changes in language (R. 162). The fact that his suggestions were so limited means only, as he admitted (R. 157), that the article otherwise met with his approval. There is nothing to indicate that he would not have suggested additional and more drastic changes if he thought them desirable for the purpose for which he intended to use it.

Long before the article was published Dorsey knew that it was contemplated using it in connection with the Peiler application provided it was published over the signature of "some apparently unprejudiced authority." See p. 41, *infra*. Dorsey stated in an affidavit (Ex. D-72-B, R. 157):

When the manuscript for the "Clarke Article" was presented to me [by Hatch], I found therein a true statement of such facts as I desired to present to the Patent Office * * *

In explaining this affidavit to the Committee, Dorsey testified (R. 135-136):

A. It was a true statement of facts, but it was not the article that I wanted. Remember, Mr. Hatch had sent me the early manuscript. I saw things that might be good in it. I was going to file the Clarke article or any article that was published if it was good, but I didn't know what was going to be published.

Q. Do you wish now to retract your statements in this affidavit?

A. I don't think I need to retract it. It was a true statement of facts which would be advisable to use in the Patent Office.

Q. Well, we may be talking at cross purposes, but as I understand this affidavit, it says that you recognized in the Hatch manuscript that it contained statements of such facts as "I desire to present to the Patent Office"?

A. That is correct, it did contain statements of facts that I wanted to present to the Patent Office.

Q. Well, didn't the Clarke article, as published, contain those statements of facts?

A. I don't remember how closely it followed the original draft that I saw. If the article was satisfactory as published, *it was my personal intention to file it in the Patent Office.* [Italics supplied.]

In addition, on May 20, 1926, two months before the article was published, Hatch wrote Dorsey in response to the latter's wire for a copy of the article (R. 149-150 (Ex. D-72-C)):

You flatter me again by wiring for a copy of the so-called "Maloney" article. I enclose one of the original drafts which I made and you will understand that Mr. Maloney will never appear in connection with this article in any way. Moreover, when the article appears in print, it will probably be changed considerably from the present form.

* * * I went to see Mr. William P. Clarke, of Toledo, the President of the American Flint Glass Workers' Union. Mr. Clarke also swallowed the labor bait which I had prepared for him and said he would be glad to revise and publish the article over his own signature if I would

get assurance for him that the Owens Company would not be offended. * * *

* * * Clarke said that he would re-write the article to a considerable extent, I suspect, and publish it in the Trade Journals. I fear I may have to go out to Toledo again to get Clarke to show some speed in this matter and perhaps to supervise what he publishes. I think he understood just what we want published, but he might unintentionally destroy some of the propaganda which we planned.

I will see that you get a copy of some Journal in which this article appears when it comes out.

Incidentally, when I was feeling rather discouraged on getting the labor article published, I had the idea of getting Jack Arbogast to write a history of his father's connection with the glass business. I am told that Jack is more or less of a loafer but would be interested in any small sum he could pick up. I think that we could introduce the matter in which we are interested in such a history and I was quite amused to think such a history would of necessity be strongly anti-labor. * * *

And in discussing this letter, Dorsey stated (R. 140):

* * * I had returned to Mr. Hatch the draft I had received in March. It went back to him. I didn't have anything. I was getting ready to amend the Peiler case, and I wanted to know what good I could

gather out of the facts stated in that article.

Q. That is the reason you wired for this draft?

A. That is what I wanted it for, no doubt, because the case was up for amendment and writing new claims.

The article was published, as written by Hatch except for exceedingly minor changes, on July 17, 1926, after Hatch had impressed upon the publishers his desire to expedite the printing (Tr. 543).¹² On June 23, 1926, (Ex. E. p. 220), prior to the actual publication, an amendment to the patent application had been prepared; this amendment, which was filed on July 31, shortly after the article appeared (*ibid.*), stated that "a discussion of the subject-matter of this case is being prepared, with affidavits and exhibits, showing the wide-spread recognition by the glass art of the novelty and great value of the features claimed herein * * *. In order to hasten the prosecution of the case, the present amendment is filed without waiting for the additional matter referred to, which will be filed in a supplemental paper as promptly as possible" (*id.*, at p. 226). This amendment, which obviously was in anticipation of the filing of the Clarke article, was signed by "Dorsey and Cole" (*id.*, at 247). On October 11, 1926, the supplementary material was filed (*id.*,

¹² Hatch's letter to the publisher, stated "We would like to have the article appear as soon as possible and I think that Mr. Clarke will not insist on seeing a proof if it is going to take extra time." (Tr. 543.)

at 261-305). The documentary attachments were preceded by a summary statement, signed by "Dorsey and Cole" (*id.*, at 261-265), which devoted most of two pages to describing and quoting from the Clarke article as describing the "revolution in the art produced by the suspended-charge feeders, referred to in the Clarke article as 'gob feeders'" (*id.*, at 263). A reprint of the article was appended (*id.*, at 303-305). Dorsey admitted that at his request a copy of the magazine containing the article was obtained and filed in the Patent Office record (R. 157-158), and that the article published was "connected" with Hatch's manuscript (R. 136):

Q. Your testimony, as I understand it, to this Board is that when you filed the Clarke article in the Patent Office, you connected it in no way whatever with the Hatch article?

A. Oh, it was connected. It was certainly connected. The Clarke article certainly had the basis of the manuscript that Hatch had sent me. There is no question about that in my mind. How close they were, I don't know.

Q. You made no effort to find out how closely—

A. No. I didn't think it necessary. I couldn't see any reason for going in and finding out, and digging into a perfectly open thing, where the man had published it under his own name.

Q. Didn't you know that the article that was published in the name of William P. Clarke as author was, in fact, prepared by Hatch at the time you filed it in the Patent Office?

A. I didn't know that the article that was published by William P. Clarke was identically the same or, in substance, as the manuscript I had received from Hatch. On the contrary, Exhibit C, this letter from Hatch gave me fair notice that the article might be materially changed. There was no reason for my going in and chasing it up. I wouldn't have minded putting it in under affidavit if I had gotten it the other way.

Subsequently, Dorsey filed a brief in the Patent Office, in the appendix to which the article was again printed in full (Ex. E, pp. 509, 593-605), in which he stated (R. 119, Ex. E, p. 477):

That the appellant's feeders have been a tremendous success and have revolutionized the art from the standpoint of economy is recognized by reluctant witnesses. We call attention to the article by William P. Clarke * * *

In regard to this brief, Brown testified that: "Mr. Dorsey and I spent a great deal of time on that brief" and that "I happen to remember that that particular paragraph which I have read was dictated by Mr. Dorsey in my presence." (R. 120.)

This evidence, which consists primarily of Dorsey's own statements and admissions, shows conclusively, we submit, that he was a knowing participant in the fraudulent scheme.¹³

The reasons advanced by respondent as to why the evidence does not show his guilt are baseless.

1. It is asserted that Dorsey didn't know anything about the plan or the article until he returned from Europe in April, 1926, that before then he had only discussed the preparation of an article or affidavit by Carter.¹⁴ But this pro-

¹³ Dorsey has argued that the letter from Carter to Boshart (*supra*, pp. 10-11) and other statements of the other respondents introduced in evidence were not admissible against him. Since there is ample evidence apart from these statements to show his personal participation in the fraudulent scheme, it is not essential that the admissibility of these statements against him be determined. But the evidence was admissible as the statements of co-conspirators, inasmuch as a conspiracy between Dorsey and the other respondents was clearly proved by other evidence. *Schine Theatres v. United States*, 334 U. S. 110, 117; *United States v. Gypsum Co.*, 333 U. S. 364, 393; *Hitchman Coal & Coke Co. v. Mitchell*, 245 U. S. 229, 249; *Connecticut Mutual Life Ins. Co. v. Hillmon*, 188 U. S. 208, 218. Cf. *Krulevitch v. United States*, 336 U. S. 440. This rule governs in civil as well as criminal cases, and has been specifically held applicable to, and given effect in, a disbarment proceeding. *In re Gladstone*, 28 F. Supp. 858, 860 (S. D. N. Y.).

¹⁴ Dorsey's brief below stated (p. 12):

"In the fall of 1925 there was some conversation between Dorsey and Brown about putting into the Peiler file an article or affidavit supporting patentability. At that time they agreed that Mr. Henry Carter, an officer of the Owens Glass Company, which was a licensee under the Hartford patents, would be a fit one to prepare this." (R. 161-162.)

posal was no more innocent than that finally adopted. For Carter was an officer of Owens, the company which had developed and used the suction machines which were the primary competition to Hartford's gob feeders. Carter too would have been regarded as a "reluctant witness" in favor of the gob feeder (see Tr. 538), as long as the secret agreement between Hartford and Owens brought to light in the antitrust litigation,¹⁵ whereby Owens was to receive half of all royalties collected by Hartford under these very patents and applications, was not disclosed.

Whether Dorsey knew anything about the Hatch article until he returned from Europe is immaterial in any event in view of what he knew and did subsequently.

2. It is asserted that although Dorsey knew Hatch had written a draft of the article, and had done the spade work and the research, he assumed that the final article signed by Clarke was revised and rewritten by him, and did not know it to be the same paper that Hatch had written. In fact, the article as printed was identical with Hatch's draft except for a few minor changes in wording.¹⁶ Dorsey had examined

¹⁵ See *Hartford-Empire Co. v. United States*, 323 U. S. 386, 393-395.

¹⁶ Clarke put in 18 words of his own, and deleted some citations and the last paragraph. See Ex. HB 1, Tr. 701-727, as explained in Tr. 93-100. He admitted that not a single sentence was his. Tr. 236. Carter's changes, as well as Clarke's, appear on the photostated Exhibit.

Hatch's draft in April 1926 (R. 162). He was sufficiently interested in the article to wire again for a draft in May (R. 140). In June he prepared the amendment stating that additional material would be submitted, and filed the amendment shortly after the article was published in July (see p. 33, *supra*). He filed and relied upon the article in October 1926, at which time he stated he believed it be truthful and correct (R. 132, 157, 162). This strongly implies that he read the article as published before filing it and was aware of its contents. Furthermore, Hatch's letter to Dorsey indicated some fear that, although Clarke "understood just what we want published", he "might unintentionally destroy some of the propaganda which we planned", and stated that Hatch might have to go out to Toledo "perhaps to supervise what he publishes" (R. 150); this statement, plus the actual similarity between the draft and the article, put Dorsey on notice—if that were necessary—that the substance of Hatch's draft would be in the finished article.

Although Dorsey now admits that he knew only that the article was "connected" with Hatch's draft, it is obvious that at that time he must have known that they were in substance the same, whether or not he knew that they were practically identical. It was admittedly his intention to file it if it was "satisfactory as published" (*supra*, p. 31, R. 136), by which obviously

was meant if the substance of Hatch's draft remained unaltered. His subsequent efforts as a highly interested witness to minimize his knowledge of the similarity were not credible, and were not credited by the committee of seven who heard him testify.

3. This becomes obvious in the light of the purpose of the scheme. Dorsey now asserts that there was no thought of using the article in the Patent Office until the text of the article as published under Clarke's name became available. If Dorsey knew whose article it really was when he submitted it to the Patent Office as the statement of "a reluctant witness," it would not be material whether the plan had matured earlier. But there can be no doubt that it did.

In an affidavit prepared in 1941, Dorsey stated (R. 157):

When the manuscript for the "Clarke Article" was presented to me, I found therein a true statement of such facts as I desired to present to the Patent Office.

And he admitted in the colloquy quoted *supra*, pp. 30-31, that the Hatch manuscript contained "statements of facts that I wanted to present to the Patent Office" (R. 135). Subsequently, he wired Hatch for a copy of the article. Hatch's reference to "the propaganda which we planned" (R. 150) does not sound as if Dorsey wanted the article merely to "know what good I could gather out of the facts stated" (R. 140). Indeed,

Dorsey admitted in cross-examination that "if the article was satisfactory as published, it was my personal intention to file it in the Patent Office" (R. 136). Hatch's letters to Dorsey "and Carter" also make it clear that the article was prepared for a specific purpose and was intended to be used; there is no place it could have been used at that time except in the Patent Office.

Hatch's letter to Dorsey also shows that Hatch was anxious to insure the speedy publication of the article, and that Hatch said that he would get Dorsey a copy when the article came out (R. 150). See also p. 32, *supra*. If all Dorsey had wanted was the "facts" set forth in the article, as distinct from the article itself, this would not have been necessary. Dorsey admits that "At my request, a copy of the National Glass Budget containing the said article, authenticated by an affidavit of the publisher, was obtained and filed in the record of the above-identified Peiler application" (R. 157-158).

And then, as Brown testified, Dorsey dictated the paragraph in the brief calling attention to the article as that of a reluctant witness, giving

"I think he understood just what we want published, but he might unintentionally destroy some of the propaganda which we planned" (R. 150).

"Of course I think you understand that the whole object of the article is to make an excuse to get the production curves and a few statements in regard to gob feeding into print" (R. 45, 149).

tribute to the Peiler feeder as having "revolutionized the art" (R. 119-120).

From the facts set forth above it is obvious that Dorsey knew all about the scheme from the beginning. Hatch so stated, as appears from the following (R. 167 (HB Ex. 67, pp. 3099-3100, 3111)):

Q. Who besides Mr. Carter did you tell that the purpose that you had in mind that the article should be printed under the name of some apparently unprejudiced authority?

A. I told all of those who were associated in my company.

* * * * *

Q. I see, did you tell Mr. Dorsey about it; you mentioned Mr. Dorsey's name before?

A. Yes.

* * * * *

Q. Now, you testified before the recess that Mr. Dorsey knew what was going on; am I correct in my recollection?

A. He did, yes sir.

In short, Dorsey admits that he edited the article, that he wired for a draft of it, that he had

¹⁹ The testimony quoted appears in HB Ex. 67; which is the complete testimony of Hatch in the Hartford-Empire anti-trust case. This exhibit was introduced by Hatch himself as a part of the disbarment record, and he adopted "the testimony given before the court at Toledo as part of [his] testimony here" (Tr. 472-473). Hatch was subject to cross-examination by Dorsey on the day following the introduction of this exhibit (R. 128).

it filed in the Patent Office, and that his brief described it as the work of an unprejudiced witness. These facts alone establish his participation in the scheme to deceive the Patent Office. His denials that he knew that the Hatch draft was the same as the published article, and that he was aware that the publication was pursuant to a plan to deceive the Patent Office were not only unbelievable, but contrary to the testimony of other witnesses friendly to him. Finally, we submit that whether or not Dorsey was in on the scheme to deceive from the beginning, his misconduct is established by his brief filed in the Patent Office if at that time he knew that the article was in substance the one written by Hatch. For the brief was the document which was designed to complete the deception of the Patent Office as to the authorship of the article.

**C. THE SCOPE OF JUDICIAL REVIEW OF THE COMMISSIONER'S
ORDER OF DISBARMENT**

Inasmuch as the evidence conclusively shows that Dorsey has participated in the perpetration of a fraud on the Patent Office, the disposition of the case does not depend on the scope of judicial review under 35 U. S. C. 11. For whether the substantial evidence rule, the clearly erroneous rule or trial *de novo* be the standard for judicial review, the decision of the Patent Office is correct and should be affirmed. That the Patent Office was right and the court below wrong—ir-

respective of the scope of review—has been shown in the preceding portions of this brief.

This Court may, however, feel it necessary to determine the proper scope of judicial review in order properly to perform its own function in this case. And since the majority below dealt with the point at some length and came to what we believe to be an erroneous conclusion, a discussion of the question seems advisable.

The holding of the majority below as to the scope of review is not entirely clear. At one point (R. 75) the court refers with approval to its practice in reviewing District Court disbarment cases of examining "the case *de novo*", and states that the District Court should do "no less to insure due process of law in reviewing cases of disbarment from the Patent Office". Further on, on the same page, the opinion refers to Section 10 (e) of the Administrative Procedure Act, we believe erroneously, as permitting the court to "review the whole record of the proceedings had below for the purpose of ascertaining any prejudicial error" (R. 75). The court later refers to that statute as requiring "substantial probative evidence" to support administrative findings (R. 75-76), and at another point the court stated that "the review contemplated was a full judicial review just exactly like that of any other case where judicial review is provided" (R. 75). And the court on several occasions indicated its disap-

proval of "the doctrine of 'administrative finality', which might better be known as 'administrative infallibility' " (R. 73, 75).

Although these phrases do not indicate too clearly what test the majority below has held to be correct, a reading of the opinion as a whole indicates reasonably plainly that the court did in fact review the evidence *de novo* without giving any weight to the findings of the Patent Office, and also that, whatever the scope of review, the court would have regarded the Patent Office findings as not supported by sufficient evidence. See R. 72 ("not a shred of evidence"), R. 76. Judges Edgerton and Morris were of the view that the substantial evidence rule was applicable, a position which, we submit, is correct. A third and intermediate position is that the substance of the "clearly erroneous" test governing the review of lower court decisions under Rule 52 (a) of the Rules of Civil Procedure might govern—an approach which we shall show is the only reasonable alternative to the substantial evidence rule. And under Rule 52 (a), the "clearly erroneous" principle unquestionably controls the review of District Court decisions by the Court of Appeals.

1. *The statute and its history do not define the scope of review.*—The controlling statute, 35 U. S. C. 11, is not of much help. It provides that:

The action of the commissioner may be reviewed upon the petition of the person

so refused recognition or so suspended or excluded by the district court of the United States for the District of Columbia under such conditions and upon such proceedings as the said court may by its rules determine.

This does not specify the scope of review, although the word "review" in itself may be said to suggest that the matter decided by the Patent Office was not to be examined *de novo*. The District Court only recently promulgated a rule under this section which states that the record before the Patent Office "shall constitute the sole basis for the court's review",²⁰ which also implies the ordinary procedure for reviewing administrative decision, but does not, of course, define the scope of review.

²⁰ On June 26, 1945, the District Court for the District of Columbia ordered its Local Civil Rules amended to add to Title VIII the following rule:

"RULE 95. Review of Orders as to Admission and Exclusion of Practitioners before Patent Office.—A person refused recognition to practice or suspended or excluded from practice before the Patent Office may file his petition in this court against the Commissioner of Patents for a review of such action within thirty days after date of the order recording the Commissioner's action, or if the action was taken within a period of ninety days before adoption of this rule the petition shall be filed within thirty days thereafter. An answer shall be filed within twenty days after service of summons. Upon filing of the answer, or in default thereof, the Clerk shall certify the case to the Assignment Commissioner, who shall promptly assign it for hearing before a justice of the court. Prior to the time for hearing the petitioner shall file a certified copy of the record and proceedings before the Patent Office, which shall constitute the sole basis for the court's review."

The history of the statute is also not very enlightening. An 1861 law (Act of March 2, 1861, 12 Stat. 246) subjected disbarment orders of the Patent Office to the approval of the President. The Act of July 8, 1870 (R. S. 487, 16 Stat. 200), transferred the power of approval to the Secretary of the Interior, in whose department the Patent Office then was located. *United States ex rel Wedderburn v. Bliss*, 12 App. D. C. 485, held that the Secretary need not hear oral argument, but that he was at most a kind of "appellate tribunal".

The statute was amended in 1922 (42 Stat. 390, 35 U. S. C. 11) so as to substitute review by a district court for the approval of the Secretary. The history of this amendment contains no reference to the scope of review. Nothing in the legislative reports or debate indicates whether the courts were to have the same authority as the Secretary of the Interior, or whether the courts were to review orders of the Commissioner of Patents in the same way in which they customarily review other administrative orders.

2. *The scope of review should be that applied by the courts to, and approved by the Administrative Procedure Act for, administrative action generally.*—In the absence of any expression manifesting a contrary intention, we think that the scope of review should be that traditionally applied to administrative decisions—in other words, the substantial evidence rule which requires ad-

ministrative findings to have a rational basis in the record as well as in law. Cf. *Rochester Telephone Corp. v. United States*, 307 U. S. 125, 146.

That test did not originate in specific statutory form, but found its primary development in suits to set aside orders of the Interstate Commerce Commission. Although the courts are given jurisdiction to set aside orders of that Commission, 28 U. S. C. 2321, the scope of review of Commission findings has not been prescribed by Congress, a situation comparable to that here. Early decisions declared that the courts had power to set aside Commission decisions only if they were beyond the power of the Commission, and thus "contrary to law." *Interstate Commerce Commission v. Louisville & N. R. R.*, 227 U. S. 88, 92; *Interstate Commerce Commission v. Union Pac. R. R.*, 222 U. S. 541, 547. In the *Louisville & N. R. R.* case, "a finding without evidence" was held to be "beyond the power of the Commission," and "an order based thereon * * * contrary to law." In the same case, at p. 94, the Court stated that its duty was to "examine the record with a view of determining whether there was substantial evidence to support the order."

In the following year the test was embodied in the Federal Trade Commission Act (38 Stat. 719, 720, 15 U. S. C. 41, 45); the statutory phrase "if supported by evidence" is similar to the phrase employed by the Court in the *Union*

Pacific case shortly before—"when supported by testimony."²¹ Since that time the substantial evidence test has been given general application in reviewing administrative decisions so long as no other standard was prescribed by statute. And this has been so whether a statute provided for judicial review but did not define the scope of review, as in the Interstate Commerce Commission cases and *Tagg Bros. & Moorhead v. United States*, 280 U. S. 420, 442, and *Rochester Telephone Corp. v. United States*, 307 U. S. 125, as well as the statute here involved, or did not provide for any judicial review at all, as in *Shields v. Utah Idaho Central R. Co.*, 305 U. S. 177.

The substantial evidence rule was recently given legislative approval as a general test to be applied throughout the field of judicial review in the Administrative Procedure Act (60 Stat. 237, 243, 5 U. S. C. 1009), which provides in Section 10 (e) that agency action may be set aside if "unsupported by substantial evidence * * * on the record of an agency hearing provided by statute."²²

²¹ An article by Dean Stason indicates that his examination of the congressional debates on the Federal Trade Commission Act led him to the conclusion that the Interstate Commerce Commission cases "were firmly in the minds of the members of the Congress when the [former] Act was adopted." Stason, "*Substantial Evidence*" in *Administrative Law*, 89 U. of Pa. L. Rev. 1026, 1040-1044 (1941).

²² In a predecessor to the Administrative Procedure Act vetoed by the President (H. R. 6324, 76th Cong., 3d sess., 86 Cong. Rec. 13942), the House expanded the scope of review

The language following the words "substantial evidence" does not appear to change the rule, although it may clarify its meaning.²³ The reasoning of the court below in this case to the effect that the Administrative Procedure Act supports its theory of review is difficult to follow, to say the least. The statute proves precisely the contrary.²⁴

to include the clearly erroneous test (86 Cong. Rec. 4669-71, 4742-44), but the Senate rejected the change (*id.*, at 13676, 13746-13748), and the House concurred in the Senate provision (*id.*, at 13809, 13815-16).

²³ Jaffe, *Administrative Procedure Re-examined: The Benjamin Report* (1943) 56 Harv. L. Rev. 704, 732-33; Stason, "Substantial Evidence" in *Administrative Law* (1941) 89 U. of Pa. L. Rev. 1026, 1035-1050. This question appears to have been left open by this Court's decision in *National Labor Relations Board v. Pittsburgh Steamship Co.*, 337 U. S. 656. A complete treatment of the point does not seem essential to the present discussion.

²⁴ It is doubtful whether Section 10 (e) applies to disbarments by administrative agencies. Section 6 (a) of the Act (5 U. S. C. 1005 (a)) provides: "Nothing herein shall be construed either to grant or to deny to any person who is not a lawyer the right to appear for or represent others before any agency or in any agency proceeding." In addition, the legislative history shows that Congress intended to keep unchanged the agencies' existing powers to regulate practice before them. Hearings before the House Committee on the Judiciary, 79th Cong., 1st sess. on H. R. 1203, p. 34; S. Doc. 248, 79th Cong., 2d sess., p. 80; S. Doc. 248, 79th Cong., 2d sess., pp. 401-405. Accordingly, in the absence of express provision for judicial review, as is true for all administrative disbarment except in the Patent Office (see *infra*, p. 50), judicial review of administrative disbarment would seem still to be restricted solely to the question of due process. *Goldsmith v. Board of Tax Appeals*, 270 U. S. 117.

We thus have a general rule as to the scope of judicial review applied by the courts in the absence of a different legislative directive before and after 1922, and approval by Congress both before and since. Only when Congress has specified that the scope of review should be different have the courts so held.²⁵ The statute here involved provides for review, but does not define its scope. The clear inference is that Congress would expect the customary rule to be applied.

3. *No different rule is required for disbarment.*—The fact that this case involves the right of an attorney to practice before an administrative agency does not require the application of any different rule. In the absence of statute it is settled that administrative agencies have authority to regulate the right of attorneys to practice before them, and that the refusal of such a right is subject to review only to the extent of ascertaining whether there has been a lack of due process. *Goldsmith v. Board of Tax Appeals*, 270 U. S. 117, 123, and cases cited. The Patent Office is one of the few agencies specifically given power to disbar. The provision for “review” of its decisions—not trial *de novo*—would not seem to be an adequate basis for making its orders as to disbarment much less consequential than the orders of other agencies.

²⁵ A number of such statutes are referred to in the Final Report of the Attorney General's Committee on Administrative Procedure (1941), p. 90.

The reference to judicial decisions by respondent (Reply Brief p. 5) and the court below (R. 75) is not helpful, inasmuch as the state appellate courts cited were not reviewing administrative action. They were dealing with appeals from lower courts, and rules as to administrative finality, of course, did not apply. And it should be noted that the federal appellate courts have ordinarily exercised great restraint in reviewing the disbarment orders of the federal district courts.* The power to disbar is regarded as involving the exercise of sound discretion by the trial court, and its disbarment order will be upset "only on a showing of abuse of discretion or great irregularity." *In re Claiborne*, 119 F. 2d 647, 651 (C. A. 1); *In re Spicer*, 126 F. 2d 288, 289 (C. A. 6); *In re Schachne*, 87 F. 2d 887, 888 (C. A. 2); *In re Chopak*, 160 F. 2d 886, 887 (C. A. 2), certiorari denied, 331 U. S. 835. Indeed, this Court initially doubted that it had the power to review disbarment proceedings. *Ex parte Burr*, 9 Wheat. 529 (Marshall, C. J.); see also, *In re Ulmer*, 208 Fed. 461, 467 (N. D. Ohio) and cases cited. And even where such power existed, Chief Justice Marshall has admonished (9 Wheat. at 530):

* * * it is extremely desirable that the respectability of the bar should be

*The scope of review in such cases would seemingly be governed by the "clearly erroneous" rule contained in Rule 52 (a) of the Federal Rules of Civil Procedure. See *infra*, pp. 54-56.

maintained, and that its harmony with the bench should be preserved. For these objects, some controlling power, some discretion, ought to reside in the court. This discretion ought to be exercised with great moderation and judgment; but it must be exercised; and no other tribunal can decide, in a case of removal from the bar, with the same means of information as the court itself. If there be a revising tribunal, which possesses controlling authority, that tribunal will always feel the delicacy of interposing its authority, and would do so only in a plain case. * * * the [Supreme] Court is not inclined to interpose, unless it were in a case where the conduct of the circuit or district court was irregular, or was flagrantly improper.

See *Ex parte Wall*, 107 U. S. 265.

It has been argued that administrative disbarment cases should not be governed by the administrative finality rule as to the scope of review because such matters do not lie within the special field of administrative competence. There would be more force to this contention if questions as to the propriety of an attorney's conduct were determined without relation to the functions of the particular agency, or to the special problems coming before it. But that is not so, as the present case indicates. Practitioners before the Patent Office have a special obligation, for that Office does not occupy the position of adversary or litigant filled by other administrative bodies. As

the Patent Office Committee stated in its opinion in this case (R. 65) :

By reason of the nature of an application for patent, the relationship of attorneys to the Patent Office requires the highest degree of candor and good faith. In its relation to applicants, the Office does not occupy the position of a party litigant; it must rely upon their integrity and deal with them in a spirit of trust and confidence; and, as a quasi-judicial tribunal, it acts in a sovereign capacity to grant them valuable property rights when these are once established.

It is a high duty and privilege to ascertain and define such rights—a duty which entails heavy responsibilities and devolves upon the attorneys as well as upon the Office, although in different degrees.

The great value of the privileges which the Patent Office grants, the need for protecting the public against abuse of the privilege, and the non-adversary nature of patent applications make observations of the highest ethical standards by Patent Office practitioners particularly essential.

Furthermore, an understanding of specialized Patent Office procedures, and, to a considerable extent, of the technical subject matter involved may often be necessary in judging the propriety of an attorney's conduct. Even in this case, where the basic deception was easy to see, knowledge of the nature of the various types of gob feeders and familiarity with Patent Office rules,

files and records and the chronology of Patent Office procedures are helpful to a full understanding of the scheme. Other cases in which an attorney may be more skillful or subtle in concealing his misconduct may require greater familiarity with technical matters. Accordingly, we submit that the Patent Office has a special competence in determining the propriety of the conduct of those who practice before it, not substantially different from the general expertness of administrative agencies in their specialized fields.

4. *Even if the substantial evidence rule is not controlling, the findings of the Patent Office officials, who heard the evidence, must be given great weight and not set aside unless clearly erroneous.*—In the absence of any restriction upon the scope of review, appellate courts have long accorded great weight to the findings of the person or persons who actually see and hear the witnesses. The reasons for this are too well known to require greater elaboration than reference to the advantages which such a trier of facts has in determining questions of credibility over judges who can merely read the printed record. Thus, although before the Rules of Civil Procedure appellate courts in equity theoretically considered an appeal *de novo* (though on the record made below), many cases established that the findings were to be accepted unless clearly wrong. See *United States v. Gypsum Co.*, 333 U. S. 364, 395; *District of Columbia v. Pace*, 320

U. S. 698, 701-702; Note to Rule 52, Federal Rules of Civil Procedure (H. Doc. No. 588, 75th Cong., 3d sess.), and cases cited therein. The rule as it existed in the prior equity practice (*ibid.*) was embodied in Rule 52 (a), which reads as follows:

Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.

The same standard for review of a master's findings appears in Rule 53 (e) (2).

Thus, the "clearly erroneous rule" in Rule 52 (a) is a restatement of the test which the courts had previously established for reviewing the findings of fact of a lower tribunal. Although Rule 52 (a) does not, as a matter of law, apply to the review of administrative findings under 35 U. S. C. 11, it would seem clear that these findings must at least be accorded the weight which the courts have traditionally given to the findings of the person who hears the witnesses—which is the test embodied in that rule.

Accordingly, we submit, if the Court does not accept our contention that the substantial evidence rule governs review in cases under 35 U. S. C. 11, the proper scope of review must be the equivalent of what is embodied in Civil Rule 52 (a). And this would be so even if the review is described as "*de novo*," since even in

such circumstances, the advantage of the person who actually hears the testimony is always recognized.

5. *The District Court's findings.*—In the normal case, under Rule 52 (a), the Court of Appeals would also be bound to accept the findings of the District Court “unless clearly erroneous” even though the District Court did not have the advantage of hearing the witnesses—although the latter fact might warrant giving the District Court’s findings less weight than those of the Patent Office. In the present case, however, the District Court applied the substantial evidence rule in evaluating the findings of the Patent Office. If this was the right test, as we believe, the District Court’s decision must be given effect, since not clearly erroneous. But if the District Court applied the wrong test, neither this Court nor the court below would be bound by its analysis of the facts.

6. *Conclusion.*—(a) We submit that the Patent Office findings should be accorded the same weight as those given administrative findings generally; they should be reviewed under the substantial evidence rule.²⁷

(b) If not, the findings should be given the weight traditionally accorded the findings of the

²⁷ As indicated above, we do not concede that the Administrative Procedure Act has modified that rule properly understood, but in any event we mean the rule as stated in that statute.

person who hears the oral evidence—i. e., the clearly erroneous rule.

(c) Even if the Court should review the record entirely *de novo*, without regard for the administrative findings, the evidence conclusively establishes Dorsey's gross misconduct, and justifies the order barring him from practice before the Patent Office.

II

THE PROCEEDINGS BEFORE THE PATENT OFFICE IN NO WAY DEPRIVED DORSEY OF DUE PROCESS OF LAW

The court below has held that in the proceedings before the Patent Office, Dorsey was deprived of the due process of law to which he was entitled. *Goldsmith v. Board of Tax Appeals*, 270 U. S. 117; *Ex parte Robinson*, 19 Wall. 505, 513; *Garland v. United States ex rel. Stevens*, 32 App. D. C. 109, 136. The court found that the proceedings in the Patent Office leading up to the disbarment order so far failed to accord Dorsey due process of law as to constitute a "kangaroo court" (R. 72) and a "classic exemplification of a citizen being deprived of a valuable right * * * without due process of law or indeed without process of law of any kind except bureaucratic 'lynch law'" (R. 69). This characterization of the Patent Office proceedings was utterly unjustified, for it is plain on the face of the record that, far from there being any denial of due process of law, Dorsey was accorded a fair hearing after having received adequate notice of the charge

which he was called upon to answer and for which he was ordered disbarred. "The proceedings were properly conducted * * * [Dorsey's] fraud was fairly charged, proved, and found" (R. 84) (Judge Edgerton dissenting).

A. DORSEY HAD A FAIR HEARING BEFORE THE PATENT OFFICE

The holding of the court below that Dorsey was denied a fair hearing in the proceeding before the Patent Office was predicated on its findings (1) that the record does not show how Dorsey's case was consolidated with that of the other practitioners (the court below characterized the consolidation as "shot-gun joindure" (R. 78) resulting in "simply a record of mob procedure" (R. 77)); and (2) that the burden of disproving the allegations against him was improperly imposed upon Dorsey. Neither of these findings has any warrant in the record.

1. *The consolidated hearing.*—As to the consolidation of Dorsey's case with those of the three other practitioners involved, it is to be noted at the outset that Dorsey has at no time during the proceedings ever questioned the propriety of consolidating his case with those of the three other practitioners similarly charged nor has he ever urged that his consent to such consolidation, if necessary, had not been given. The court below, while recognizing that Dorsey had not questioned the consolidation, and even reproducing a portion

of his brief wherein he affirmatively accepted the consolidation of the four cases for the purpose of making a joint record, refused to accept that "a lawyer of the admitted experience and ability of [Dorsey] would deliberately and voluntarily have verbally agreed to waive his rights" (R. 78). Accordingly, since "under the circumstances it could only be done by consent and stipulation" (R. 77), and since "a painstaking examination of the record has failed to reveal to this court either the specific terms of any such stipulation or the purport thereof" (R. 77-78), the court condemned the proceeding as a "shot-gun joindure" and the record as "simply a record of mob procedure" (R. 77, 78).

But the following colloquy plainly shows that before the introduction of any testimony, Dorsey, who then was appearing *pro se*, explicitly consented to the combining and making of a consolidated record (R. 109-110):

The CHAIRMAN. Shall we go ahead with our proof? I was going to ask if there was any objection to our combining and making a consolidated record.

Mr. DORSEY. Except, your Honor, I would like my testimony to come in by itself, because it is such a small part of the enormous picture. I would like an opportunity to present my case by itself anywhere in their case that it fits in.

Mr. GOODRICH. May we work that out?

The CHAIRMAN. Yes.

Mr. GOODRICH. I am sure we can adjust that between us.

Mr. BROWN. Mr. Dorsey, the testimony of these other men so far as it affects you will be part of your case.

Mr. DORSEY. Yes, but so far as I know they can't say anything about me, because I didn't see them.

Mr. BROWN. But if there is anything about you—

Mr. DORSEY. Oh, yes; it is sworn testimony, and I have an opportunity to cross-examine.

Mr. GOODRICH. I think we all understand that although we have four cases here, there will be but one record.

The CHAIRMAN. Yes.

Subsequently, Dorsey, in discussing the method of examining witnesses and introducing exhibits, further indicated his acceptance of the making of the joint record (R. 110-111). He never objected to the consolidation.

Moreover, even in the absence of express consent, it would have been entirely lawful in the interest of trial convenience to have consolidated the cases for the making of a joint record, inasmuch as the cases arose out of the same transaction and involved many of the same questions of fact. Cf. Rule 20 of the Federal Rules of Civil Procedure.

2. *The burden of proof.*—The record equally clearly reveals the unsoundness of the holding below that the burden of proof was imposed upon

Dorsey and that he was required affirmatively to disprove the allegations against him (R. 72). The Department of Commerce offered the findings of the District Court in the antitrust case (46 F. Supp. 541, affirmed, 323 U. S. 786), and the opinions of the Court of Appeals for the Third Circuit and of this Court in the *Hazel-Atlas* case (137 F. 2d 764, 765, 322 U. S. 238). The Committee admitted the documents as "the basis for these rules to show cause" but stated that "they are not admitted as proof of anything stated in them". Tr. 19-20. See also R. 100. In addition, the Department of Commerce introduced as exhibits the records before this Court in the *Hazel-Atlas* case and in the related *Shawkee Mfg. Co. v. Hartford-Empire Co.*, 322 U. S. 271 (No. 423, October Term, 1943); these were received in evidence with consent of the parties only "to the extent that they contain written evidence in the form of admissions and certain other papers hereinafter identified as having been signed, sent, or received by these respondents as they purport to have been." (R. 41, 106-107.)²¹

These materials constituted the entire case introduced against respondents, and in the absence of explanation plainly established at least a prima

²¹ During the proceedings it was stipulated on behalf of the practitioners other than Dorsey that letters included in these records were written, sent, or received as indicated by the letters. These letters, however, were not to be accepted as proof of the facts stated therein, except as they contained admissions by the writers thereof (Tr. 462, 522, 634).

facie case that fraud had been perpetrated on the Patent Office in regard to the preparation and filing of the so-called Clarke article and that Dorsey and the other practitioners involved had participated therein. The effect of this *prima facie* case was, as all parties understood, to shift to the respondents the burden of coming forward with the introduction of evidence to rebut it. Respondents did not at that time object to the procedure. The attorney for two of them expressly agreed to it: "The burden is on the respondents. All right. We will take it. We are here for that purpose, to meet that burden. We want to meet it in an orderly, legal way, according to the rules of procedure" (R. 98). Dorsey did not dissent. Indeed, he stated that since "we reached the conclusion there was no redress for us until charges were preferred, when we would have a chance to answer. * * * I welcome these charges." (R. 100.) The remaining evidence in the record (all of the oral testimony and most of the exhibits) was introduced entirely by the respondents.

Although the burden of going forward to rebut the *prima facie* case was thus shifted to respondents, the burden of proof on charges set out in the show cause orders was not so shifted. The Committee on Enrollment and Disbarment did not hold that any such burden had been imposed upon respondents, nor did it recommend that the

Commissioner take any action excluding Dorsey from practice before the Patent Office because Dorsey had failed to sustain that burden, as the court below held (R. 72). On the contrary, the Committee, without reference to the burden of proof, concluded—and the dissenting judge below agreed (R. 84)—that “the record * * * indubitably and conclusively shows and establishes that the respondents and each of them has been guilty of gross misconduct toward the Patent Office” (R. 66). In these circumstances, even if the Committee had imposed the burden of proving innocence on respondents, the impropriety of that ruling has been rendered harmless by the conclusive nature of the evidence as to the perpetration of the fraud and Dorsey’s participation therein.”

²⁰ It is apparent from the record that the respondents considered that they were receiving a fair hearing from the Committee. Dorsey, who was appearing *pro se*, absented himself from one hearing with the message delivered to the Committee by one of the other counsel that “so far as he is concerned, we may proceed in his absence” (Tr. 128). In addition, counsel for two of the respondents, apparently speaking for all, suggested that a witness be seen privately “without us there” (Tr. 124). Subsequently, he further suggested that the chairman constitute himself a committee of one to go to see the proposed witness. “I think frankly that if he is interviewed you yourself should do it, and do it alone and not take anyone from either side with you, or anyone else” (Tr. 128). The fact that this suggestion was not acted upon serves to emphasize that the Committee was according respondents a fair hearing.

B. DORSEY WAS GIVEN ADEQUATE NOTICE OF THE MATTERS FOR WHICH HE WAS ORDERED DISBARRED

The further holding of the court below that Dorsey was not given adequate notice of the charges against him also has two facets. First the court below found that there was a fatal discrepancy between the charge in the show cause order in regard to the filing of the Clarke article in the Patent Office and the charge of which he was found guilty. In its view, the charge noticed in the show cause order was that of having falsely represented Clarke to be the author of the article whereas the district court, the court below noted, had found that "the critical point [of the Patent Office finding of gross misconduct] is that it was material in the consideration of such article to know that it was substantially prepared and published by those interested in securing the allowance of the broad claims of Peiler" (R. 80). This "critical" point, the court below held, was not encompassed by the "specification" of the show cause order "nor can it be construed as broad enough to cover it" (R. 80). Secondly, the court below found that the disbarment was predicated in new counts not specified in the show cause order; i. e., that he had participated in the use of the Clarke article in the subsequent proceedings in the Court of Appeals for the Third Circuit, and in Hartford's payment of \$8,000 to Clarke in 1932. These rulings are likewise without substance.

1. There was in fact no prejudicial discrepancy between the charge as noticed and as found. The charge that Dorsey had falsely represented that Clarke was the author of the article implicitly also charged the improper concealment of the participation of Hartford's employees in the preparation of the article. The two are merely opposite sides of the same coin, i. e., the true state of the facts in regard to the preparation of the Clarke article. This is clear from the conclusion of the Committee on Enrollment and Disbarment. It specified as elements of respondent's gross misconduct "the deliberate concealment from the Patent Office of the facts that (a) the so-called Clarke article was prepared by and on behalf of Hartford; (b) that the sponsorship of the article by Clarke and the notation thereon of Clarke's name as author was procured by and on behalf of Hartford" (R. 66); and it concluded from these that "in the perpetration of such concealment all of the respondents * * * connived * * * with the intention of misleading and deceiving the officials of the Patent Office as to the true state of the said material facts concerning the connection of Hartford with the preparation and publishing of the article with Clarke's name appearing thereon as the author thereof, when in fact he was not the true author thereof." (R. 66.) The district court's formulation of the "critical point" merely stated the charge as made and found in alternative terms.

Moreover, even if there had been a discrepancy, it would not have involved a failure to give adequate notice in a proceeding to disbar a practitioner from practice before an administrative agency such as the Patent Office. The court below, in holding that it did violate due process, was giving effect to the assumption which underlies its opinion in this case that the disbarment here will operate to prevent Dorsey from practicing law generally and that a proceeding leading to such a result is criminal in nature. The fact is, as the dissenting judge pointed out, "the term disbarment, though convenient, is not exact. The order of the Patent Office * * * do[es] not forbid [Dorsey] to hold himself as a lawyer, advise clients and appear in courts. [It] exclude[s] him from practice before the Patent Office" (R. 83). Even where the disbarment order does operate to disqualify the attorney from practice generally, it is well-established that "The proceeding is in its nature civil, and collateral to any criminal prosecution by indictment. The proceeding is not for the purpose of punishment, but for the purpose of preserving the courts of justice from the official ministration of persons unfit to practise in them." *Ex parte Wall*, 107 U. S. 265, 288; *Randall v. Brigham*, 7 Wall. 523, 541; *In re Spicer*, 126 F. 2d 288, 289 (C. A. 6); *Hertz v. United States*, 18 F. 2d 52, 54 (C. A. 8); *Ex parte Burr*, 4 Fed. Cas. No. 2186, p. 796. It is also well-established that the notice given of the

proceedings need not spell out with the specificity of a criminal indictment the nature of the charges involved. "The proceedings for such discipline need not comply with all the formalities of process or other trial procedure. The informality by which action is taken, the charges made, or the notice given to the attorney charged with misconduct will not invalidate the proceedings. It is sufficient if the attorney has notice of the charges against him and an opportunity to prepare and present his defence." *In re Claiborne*, 119 F. 2d 647, 650 (C. A. 1); see, also, *Ex parte Wall*, 107 U. S. 265, 271; *Randall v. Brigham*, 7 Wall. 523, 539; *Thatcher v. United States*, 212 Fed. 801, 806 (C. A. 6); *United States v. Parks*, 93 Fed. 414 (C. C. D. Colo.); *Ex parte Steinman and Hensel*, 95 Pa. St. 220; cf. *Conley v. United States*, 59 F. 2d 929, 935 (C. A. 8); *United States v. Hicks*, 37 F. 2d 289, 292 (C. A. 9). In these circumstances, an insubstantial discrepancy such as that apparently perceived by the court below in a disbarment proceeding of only limited effect clearly does not constitute a violation of due process.

2. Dorsey's disbarment was not predicated on his having participated either in the use of the Clarke article in the Court of Appeals for the Third Circuit or in Hartford's payment of \$8,000 to Clarke in 1932. The Committee found that Dorsey had been (R. 66):

guilty of gross misconduct toward the Patent Office in connection with the so-called Clarke article, the most salient points of said misconduct being: First, the preparation and the presentation of the article to the Patent Office in such a manner as to induce the Patent Office officials to believe that the article compared the commercial success of the specific invention of the Peiler application with the commercial success of the Owens machines, whereas, in truth, the comparison was of the commercial success of gob feeding machines in general—of which there were several types other than Peiler's—with the commercial success of the Owens machines; and, Secondly, the deliberate concealment from the Patent Office of the facts that (a) the so-called Clarke article was prepared by and on behalf of Hartford; (b) that the sponsorship of the article by Clarke and the notation thereon of Clarke's name as author was procured by and on behalf of Hartford, and (c) that the publication of the article in the National Glass Budget was procured by Hartford and on its behalf through Hatch. We hold and believe that in the perpetration of such concealment all of the respondents deliberately collaborated not only with each other but also directly or indirectly with Clarke, and that all of the respondents connived with each other with the intention of misleading and deceiving the officials of the Patent Office as to the true state of the said material facts

concerning the connection of Hartford with the preparation and publishing of the article with Clarke's name appearing thereon as the author thereof, when in fact he was not the true author thereof, and all this for the purpose of securing favorable action by the Patent Office with respect to the claims in the Peiler application.

There is nothing in these findings in any way supporting the holding below that Dorsey (or any of the respondents) was disbarred for participation in the use of the Clarke article in the Third Circuit litigation or in the \$8,000 payment to Clarke.

In the first place, it is to be noted that the Committee did not find that Dorsey had participated in these subsequent events (R. 54-60). On the contrary, it specifically noted that they concerned "all of the respondents except Dorsey" (R. 55).

Even apart from this, the vice of the holding below stems from the court's reading of the Committee's discussion of the payment to Clarke in 1932 (R. 54-60) and of the use of the Clarke article in the Third Circuit litigation (R. 55) as equivalent to additional charges.³⁰ But, as the

³⁰ This misreading by the court below of the Committee's findings lies at the basis of its statement: "So far as we have been able to find never before in the history of the country has a subordinate committee of a mere bureau of the government had the arrogance to assume to set itself up as the protector [sic] of the dignity and intelligence of a United States Court of Appeals" (R. 81).

district court recognized (R. 25), the Committee did not so consider these subsequent events. The Committee itself explicitly stated that it referred to these only as they were relevant to the conduct of the respondents with respect to the filing of the Clarke article in the Patent Office. "These subsequent events," the Committee noted, "cast their light backwardly on the activities of the parties during the time of preparation and filing of the Clarke article, giving added illumination with regard to the purposes, understandings, and intentions of respondents at that time" (R. 54-55).³¹ Clearly, therefore, these events were not the basis of charges for which anyone was disbarred.

3. The Patent Office found not only that respondent had concealed the true authorship of the article, but that the article was presented to the Office as if it pertained to the Peiler application, whereas "in truth, the comparison was of the commercial success of the gob feeding machines in general—of which there was several types other than Peiler's—with the commercial success of the Owens machines" (R. 66). Respondent argued below—but the court below did not hold—that he had not been charged with

³¹ That the other respondents regarded these subsequent events as relevant is obvious from the fact that these events are extensively discussed in their answers to the order to show cause and affidavits filed before any evidence was introduced (Tr. 605, 958 *et seq.*, 981 *et seq.*).

misrepresenting the content of the Clarke article to the Patent Office.

a. The order to show cause (R. 9-10) does not charge specifically misrepresentation as to the content or teaching of the article, although it contains language which might suggest that the entire subject of the presentation of the article to the Patent Office was under inquiry (R. 9). But the point in question was fully explored in the testimony, without objection from anyone. The article itself shows on its face that it refers to all gob feeders, not merely Peiler's (Tr. 701, *et seq.*) as Clarke, respondents' first witness and the signer of the article, admitted (Tr. 252). Subsequently, for the apparent purpose of showing that the article was not intended to support the Peiler application, the same point was brought out by counsel for the other respondents," on direct examination of Peiler (Tr. 317), R. D. Brown (Tr. 362), Hatch (Tr. 479-480), Carter (Tr. 607, 614-615), and Hostetler (Tr. 683, 685).²² Indeed, counsel for Hatch and Brown asserted that the article did not apply exclusively to Hartford's machines (Tr. 506). These statements prompted an inquiry into the subject more fully in cross-examination. See Tr. 321-322 (Peiler); Tr. 366 (R.

²² Dorsey appeared *pro se*, and permitted counsel for the other respondents to undertake the primary burden in the proceeding.

²³ These were all the witnesses, except for Dorsey who submitted himself for cross examination.

D. Brown), Tr. 533-535 (Hatch), (R. 142-146) (Dorsey). According to the evidence (R. 120), Dorsey had dictated the portion of the brief which represented the article as proving that "appellant's [Hartford's] feeders * * * have revolutionized the art" (R. 144, Ex. E, p. 477). As a result, Dorsey was cross-examined as to how the article "justified the argument that the Peiler invention * * * had revolutionized the art" (R. 143). He admitted that "there is nothing in the Clarke article that would indicate that Peiler was the broad inventor" (R. 144), and sought to explain away his use of the article to give a different impression (R. 144-145). He did not object to the questioning on this point.

Thus the facts relating to this issue were elicited largely at the instance of other respondents' counsel, and Dorsey in particular was given a full opportunity to state his position and to tell what occurred. The basic evidence was the article and Dorsey's brief, as well as other documentary material in the Patent Office file;²⁴ indeed, the misrepresentation as to authorship and as to the content of the article are found in the same sentence of the brief.²⁵ Since both oc-

²⁴ The evidence on this point is summarized more fully in the findings of the Committee (R. 52-54).

²⁵ "That the appellant's feeders have been a tremendous success and have revolutionized the art from the standpoint of economy is recognized by reluctant witnesses. We call attention to the article by William P. Clarke," etc. (R. 119, 144, Ex. E, p. 477).

curred during the course of the same transaction and since all pertinent testimony on the latter was heard, it is clear that Dorsey was given a fair opportunity to defend himself on this issue.

Although the Rules of Civil Procedure are not applicable to proceedings before the Patent Office, they provide the answer to the contention that findings based upon evidence introduced on an issue not pleaded violate the Due Process Clause. Rule 15 (b) provides:

When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; *but failure so to amend does not affect the result of the trial of these issues.* [Italics supplied.]

Rule 54 (c) states:

* * * every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings.

These rules, which obviously are not unconstitutional,³⁶ indicate that it was entirely proper for the Patent Office here to base its decision on evi-

³⁶ The rules reflected the prior practice. See *Nashua Savings Bank v. Anglo-American Co.*, 189 U. S. 221, 232; *Mutual Ben. Association v. Moyer*, 94 F. 2d 906 (C. A. 9).

dence taken without objection in the circumstances described above. Many cases have held that the failure to object to evidence on a point is an implied consent to consideration of the issue. *Venuto v. Robinson*, 118 F. 2d 679, 683 (C. A. 3); *United States v. Cushman*, 136 F. 2d 815, 817 (C. A. 9), certiorari denied, 320 U. S. 786; *Pennsylvania Casualty Co. v. Miller*, 145 F. 2d 292 (C. A. 7); *Lientz v. Wheeler*, 113 F. 2d 767, 769 (C. A. 8); *Moore v. DeGuire*, 43 F. Supp. 70 (S. D. N. Y.), affirmed, 125 F. 2d 486 (C. A. 2). Here, the point in question was closely related to the issue pleaded, and was fully developed in the evidence largely by respondents themselves as well as through documents already introduced.

Disciplinary proceedings, even in the courts, are civil, not criminal, in nature. *Randall v. Brigham*, 7 Wall. 523; *Ex parte Wall*, 107 U. S. 265; *In re Claiborne*, 119 F. 2d 647 (C. A. 1). " * * * a disciplinary proceeding is not and should not be tried as a criminal case, and where, as here, a multi-partite situation is involved in such a proceeding, the court should be untrammelled in its investigation of every facet thereof." *In re Gladstone*, 28 F. Supp. 858, 860 (S. D. N. Y.). "It was not necessary that these [disciplinary] charges should have been presented with the same particularity and formality as is ordinarily required in criminal actions." *Philbrook v. Newman*, 85 Fed. 139, 140 (C. C. N. D. Cal.).

As long as a respondent in a disbarment proceeding has a fair opportunity to explain and defend his conduct, his rights are not violated.

b. The Patent Office, of course, also found Dorsey guilty of concealing the authorship of the article, an offense unquestionably adequately described in the order to show cause. This finding, in itself, was sufficient to support the order of disbarment. Since, as we show elsewhere in the brief, this finding was fully supported by the evidence, the Commissioner's order (R. 10-11)—which stressed this aspect of the findings—should be sustained irrespective of the findings as to the misuse of the article. Even in criminal law a general verdict stands if one count “is good and warrants the judgment” (*Pinkerton v. United States*, 328 U. S. 640, 642n; *Claassen v. United States*, 142 U. S. 140, 146-7), and a concurrent sentence on several counts will not be set aside if any count is sustained (*Brooks v. United States*, 267 U. S. 432, 441, and cases cited; *Hirabayashi v. United States*, 320 U. S. 81, 85). As the Circuit Court stated in a disbarment case (*Philbrook v. Newman*, 85 Fed., at 141):

It seems to be claimed by plaintiff that he was tried upon other charges than those specified in the citation, and found guilty of these. * * * If there were a number of charges against the plaintiff, and the court had jurisdiction to hear and determine only one, and that one was sufficient to support the judgment, that would

make the judgment valid. In an indictment containing a number of counts, this has been held to be the rule. A verdict and judgment will be sustained if any count is good. *Claassen v. U. S.*, 142 U. S. 140, 12 Sup. Ct. 169; *U. S. v. Pirates*, 5 Wheat. 184. This is certainly the rule in civil cases. * * *

III

THE LAPSE OF TIME DOES NOT INVALIDATE THE DISBARMENT ORDER

The 18-year interval between the preparing and presenting of the Clarke article to the Patent Office in 1926 and the issuance of the show cause order to disbar Dorsey from practice before the Patent Office therefor in 1944 does not, as the court below held (R. 69-72), in any way undermine the propriety of the Commissioner's disbarment order. In the first place, it has never been contended by Dorsey nor held by the court below that statutes of limitations apply to actions to disbar. See *United States v. Parks*, 93 Fed. 414 (C. C. D. Colo.). In the second place, it is plain that even could the doctrine of laches be applied against the Government, it has no place here in view of the circumstances. Although the Clarke article itself was prepared and presented to the Patent Office in 1926, the facts in regard thereto were not brought fully to light until at least thirteen years later. As pointed out by this Court in rejecting a contention based on the lapse of time advanced in the *Hazel-Atlas* case in op-

position to the reopening of the judgment sustaining the Peiler patent, "Indisputable proof of the * * * facts was, for the first time, fully brought to light in 1941 by correspondence files, expense accounts and testimony introduced at the trial of the *United States v. Hartford-Empire Company et al.*, 46 F. Supp. 541, an antitrust prosecution begun December 11, 1939." 322 U. S. at 243. Such "success in concealing fraud for many years" does not "create a prescriptive right to exemption from its consequences." R. 84 (Judge Edgerton dissenting).

Moreover, the Commissioner of Patents acted promptly in issuing the show cause order. The district court in the antitrust case entered its findings on August 25, 1942. 46 F. Supp. 541. In November 1942, before the entry of these findings, Hazel-Atlas had petitioned the Court of Appeals for the Third Circuit to reopen its judgment. Record in No. 398, October Term, 1943, pp. 5-9. The *Hazel-Atlas* case was not finally terminated until June 12, 1944, when this Court denied rehearing. 322 U. S. 772. See R. 41. The show cause orders were issued in October 1944 (R. 9). While these cases were pending, "the Office did not feel justified in taking any action in the premises until after the respondents had full opportunity to take such steps in the cases cited as to them might have seemed appropriate" (R. 41).

In re Adriaans, 28 App. D. C. 515, relied on

by the court below as a "bay-horse" (R. 70), is distinguishable and not here controlling. In that case there was a 12-year delay in instituting charges, although all the facts relating to the alleged misconduct were known from the outset. In the present case, on the other hand, the delay was due to Hartford's success in concealing for at least 13 years the facts surrounding the Clarke article. In addition, the court in the *Adriaans* case found that independently of the delay the evidence did not support the disbarment order. Here, on the other hand, as we have already demonstrated, there is no such deficiency; the evidence here conclusively shows that a fraud had been perpetrated upon the Patent Office and Dorsey had participated therein.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment below is erroneous and should be reversed.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

1949

No. ~~722~~ 53

LAWRENCE C. KINGSLAND, COMMISSIONER OF
PATENTS,

Petitioner,

vs.

VERNON M. DORSEY

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF
CERTIORARI

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 729

**LAWRENCE C. KINGSLAND, COMMISSIONER OF
PATENTS,**

Petitioner,

vs.

VERNON M. DORSEY,

Respondent

**BRIEF IN OPPOSITION TO PETITION FOR WRIT OF
CERTIORARI**

Opinions Below

The opinion of the United States District Court for the District of Columbia is reported in 69 Fed. Supp. 788, 803, and will be found on pages 24 et seq. of the record. The opinion of the United States Court of Appeals for the District of Columbia is not yet reported but will be found on pages 141 et seq. of the record.

Jurisdiction

The judgment of the Court below was entered on January 26, 1949 (R. 156). The jurisdiction of this Court is invoked under Title 28, U. S. C. Section 1254(1).

Statutes Involved

Title 35 U. S. C. Section 11. It is as set forth on pages 2 and 3 of the Petition for Writ of Certiorari herein.

Questions Presented

1. Whether an ordinary Patent Office disbarment proceeding should be reviewed in this Court where a special statute particularly provided for its review in the United States District Court for the District of Columbia and where that review was conducted in accordance with settled practice governing disbarment proceedings.

2. Did the opinion of this Court in *Hazel Atlas v. Hartford*, 322 U. S. 238, compel a conclusion of gross misconduct committed by this respondent as a member of the Patent Bar, where the record disclosed but a minimal connection by him with the misconduct charged and then as local associate counsel for a time but never as general counsel in control of the case?

3. Whether the disbarment of respondent in the United States Patent Office was unjustified on the evidence produced against him, as found by the Court below in the exercise of its jurisdiction to review under the Statute and settled law governing such proceedings?

4. Should this Court reexamine this voluminous record of an ordinary Patent Office disbarment proceeding involving conduct in 1926, when the hearing was held in 1944, and the record discloses that those responsible for the misconduct charged have been disbarred and respondent's connection was minimal, and the proof, after almost two decades, showed his conduct has never been questioned either before or after the charges preferred against him?

Argument

Among the many reasons why this Court should deny the Writ of Certiorari are:

I

Nothing is involved in this case but a question of fact. The Court below disposed of this question.

II

The United States District Court for the District of Columbia and the United States Court of Appeals for the District of Columbia are the proper tribunals to review the disbarment proceedings originally initiated herein and this is sufficient review.

Congress has by statute provided for review in the lower tribunals, Title 35 U. S. C. Section 11. The pronouncements of this Court discourage review by this Court in cases of local law. A fortiori, in cases where Congress has placed review of factual situations in the lower federal tribunals this Court will not review.

In *Busby v. Electric Utilities Employees Union*, 323 U. S. 75, 77, 89 L. E. 79, 80, this Court held that:

"Only in exceptional cases will this Court review a determination of such a question (i.e. questions of local law of the jurisdiction over which it presides) by the Court of Appeals for the District of Columbia."

This court also said (page 79):

"By rule 81(e), the law of the state in proceedings in the District Court of the United States for the District of Columbia (now United States District Court for the District of Columbia) is the law applied in the District of Columbia. That law is derived from . . . statutes of Congress."

See also *Griffin v. U. S.*, 17 L. W. 4374, #417, Oct. Term 1948.

Congress has vested review of Patent Office disbarment proceedings in the United States District Court for the District of Columbia (U. S. C. Title 35, Section 11). They are not reviewable in any other Federal District Court. All final orders of the District Court are reviewable in the United States Court of Appeals for the District of Columbia. Title 17, Section 101 D. C. Code (1940); Title 11, Section 205 D. C. Code (1940).

The Petition herein (page 16), in overstressing for review of this purely local matter, limns the position of the Court below for reviewing disbarment proceedings of the Patent Office as strategic. It points this comment as one of the reasons why the supervisory authority of this Court should be exercised in this case. The statute created no such distinction. As early as 1861, 12 Stat. at Large 247, disbarment of patent practitioners was made subject to the approval of the President. In the Patent Acts of 1870 and again in 1874, approval of the Secretary of the Interior was substituted for Presidential action. U. S. Code, Title 35, Section 11, the statute involved herein, provided for a *judicial* review of such disbarments in the United States District Court for the District of Columbia. While this Court may exercise supervisory jurisdiction over a Federal Court in the District of Columbia, it will do so only in such exceptional circumstances as mentioned in *Busby v. Electric Utilities Employees Union* and *Griffin v. United States*, *supra*, and no such circumstances exist in this case. Nothing distinguishes this disbarment proceeding from those which the Court below is called upon frequently to review where disbarment has been pronounced against practitioners before the bars of the various other Courts within its jurisdiction.

III

The Staleness of the Charges

Pursuant to Title 35, Section 11 U. S. C., which provides that the Commissioner of Patents may exclude from further practice one guilty of gross misconduct, the respondent, Dorsey, was permanently disbarred. However, some of the members of the same Committee on Disbarment thought his suspension for a year sufficient. And the United States District Court for the District of Columbia, in affirming, said:

"It is indeed tragic that the severe penalty of disbarment should be visited upon this petitioner for the acts of such distance in the past." 69 Fed. Supp. 788, 803 (R. 47-48).

The Court of Appeals reversed. It criticized respondent's disbarment by the Patent Office.

The conduct complained of is alleged to have occurred in 1926. Prosecution began in 1944. Two decades, almost, is too long a lapse under this voluminous record and should indicate appropriate caution in the prosecution of serious charges so stale, against one whose career at the patent bar had been without blemish for over half a century before and after the misconduct alleged. The memory of witnesses cognizant of the facts is then necessarily faulty if indeed dependable at all, and reliable evidence to prove grave professional delinquency with satisfying persuasion fades into dangerous acceptance, particularly where, as here, the evidence against Dorsey lay in that realm of fading memory and not in documentary proof.

As to the office of an attorney, this Court in *Bradley v. Fisher*, 80 U. S. 335, 20 L. E. 647, 652, said:

"Admission as an attorney is not obtained without years of labor and study. The office which the party

thus acquires is one of value, and often becomes the source of great honor and emolument of its possessor. To most persons who enter the profession, it is the means of support to themselves and their families. To deprive one of an office of this character would often be to decree poverty to himself and destitution to his family. A removal from the Bar should, therefore, never be decreed when any punishment less severe—such as reprimand, temporary suspension or fine—would accomplish the end desired.”

Although the Statute of Limitations does not apply in disbarment proceedings, Courts have condemned the bringing of stale charges. See Annotation in L. R. A. 1915D, 1218; 45 A. L. R. 1111.

The language of the Court in the case of *In Re Adriaans*, 28 App. D. C. 515, 524, is pertinent here.

7 “The power to disbar ought always to be exercised with great caution and only in clear cases. No criminal proceedings on this account were commenced against this respondent, and after this long delay we cannot agree with the court that the matters disclosed by this record suffice to sustain this order. *This is not a criminal proceeding, but such a charge should be supported by a preponderance of satisfactory evidence.* The case should be clear and free from doubt. The career of an unworthy member of the bar is apt to reveal misconduct more recent than in this case, where the proof is legally insufficient to disbar this respondent on account of an offense alleged to have been committed about twelve years ago.” (Italics supplied.)

IV

Dorsey's Connection With Hazel Atlas v. Hartford Disproves Petitioner's Claim That the Decision Below Conflicts With the Ruling of This Court.

Petitioner's brief relies almost exclusively upon the claim that the Court below ignored the decision of this

Court in *Hazel Atlas v. Hartford, supra*. It did no such thing. Dorsey was not a party to those proceedings. The misconduct condemned by this Court in that case contained no reference to him whatsoever. It made no allocation of responsibility for the fraud. It could not. Nevertheless, four patent practitioners were ordered disbarred. They were Brown, Carter, Hatch and Dorsey. Brown died almost immediately after his order of his disbarment. The remaining three petitioned the District Court for review. The District Court affirmed. Only Dorsey, however, now 80 years of age and a member of the bar for 59 years and who asserted and continuously relied upon his complete innocence of any wrongdoing, appealed. He prevailed. The District Court had proceeded in its review on the erroneous theory that it must follow the substantial evidence rule of administrative tribunals, notwithstanding it was proceeding under a particular statute which gave it power of full review.

The Rule to Show Cause why he should not be disbarred, issued against Dorsey by the Patent Office, recites only that he participated in the preparation of the Clarke article and presented it at the hearing on the patent application (R. 13).

Dorsey's connection with the Hazel Atlas transaction and the testimony produced at the disbarment hearing relative to his participation therein substantially appears on pages 94 to 104 of this record.

The language of the Court below relative to Dorsey's participation is appropriate.

"It is our opinion that appellant was disbarred by the then Commissioner without substantial probative evidence on any of the five points in which he was found guilty and without any evidence at all on some of them. Some of the allegations on which the Committee found Dorsey guilty were so puerile they should have been summarily stricken by the Commissioner and, failing that, by the trial court.

The so-called Board (spoken of in appellee's brief as sacrosanct) especially disclaimed any controlling influence from the decision of the Supreme Court in *Hazel Atlas Glass Co. v. Hartford Empire Co.*, 322 U. S. 238, 64 S. Ct. 997, or by the decisions of the Third Circuit Court of Appeals. This disclaimer was obviously necessary because Dorsey was not a party to any of these suits, had no opportunity to appear and defend himself and is in no sense bound by them. Even the able Special Counsel could not escape this necessity as witness his strident disclaimer. (App. Br. 33). *Even he had to admit that there was nothing in these opinions to establish individual guilt on the part of Dorsey.*" (Italics supplied.) (R. 148.)

The Petition, page 17, criticizes the test of good faith applied by the Court below to Dorsey and compares it with the language of this Court in the *Atlas* case, namely,

"The article even if true should have stood or fallen under the only title it could honestly be given, that of a brief prepared by Hartford's agents, attorneys and collaborators. 322 U. S. 247."

This language does not stigmatize with guilt all or any who may have been a Hartford agent, attorney or collaborator. This Court never intended that its language should be distorted into a conviction without a hearing of any one whom some prosecutor later might cast as a respondent because he was found to be within the range of the categories mentioned. Neither can this language be interpreted into such a violent denial of due process that any hearing, later given, must be ineffectual and *pro forma*, upon the question of the guilt or innocence of such a one, because of the language used by this Court. Fairly read, all this Court intended to state was that any Hartford agent, attorney or collaborator who knowingly and with intent engaged him-

self in (a) the preparation of an article by the employees of Hartford, (b) the persuasion by Hartford of Clarke to sponsor that article, (c) the publication of the article by Hartford as the composition of Clarke, (d) the filing of the article in the Patent Office as his with the intent to influence the action of the Patent Office was guilty of perpetrating a serious fraud upon the Patent Office. And the subsequent payment of a large sum of money to Clarke, evidently to suppress the facts about the origin of the article gave persuasive color to the conduct of those concerned therein as fraudulent and evil. Without this payment in proof, it is doubtful if the disbarment of anyone could have been justified. Serious mistakes of judgment, honestly made, can hardly warrant the extreme penalty of disbarment. When, however, fraudulent purpose, intent, and combination vitalize the evil to be found in otherwise questionably immoral and unethical practice, then the mind moves away from doubt into certainty. And the resultant sanction which such conduct merits engages more serious punishment. But Dorsey knew nothing of any payment to Clarke,—any more than those who prosecuted or sat in judgment on him. He did not participate in any of the recited acts except the filing of the article in the Patent Office as one written by Clarke,—and he did this under his belief that it was written by Clarke. He was without knowledge of any of the other conspiratorial acts. His good faith, therefore, was measured by a different rule than that to be applied to members of the general conspiracy,—and rightly so. Both the District Court and the Court below found there was no evidence that Dorsey participated in, or knew of, the payment of any money to Clarke. And that was one of the crucial grounds,—if not a controlling one, upon which disbarment was sought (R. 42-154).

Insofar as the petition alleges (page 20) :

“Dorsey was a party to the original discussion which resulted in the Clarke article.”,

all Dorsey did was to change two or three words in a manuscript sent him by Hatch. That was not the same manuscript Hatch submitted to Clarke and which this Court condemned (R. 106, 109, 113, 114 and 115).

The petition (p. 20) continues :

“Hatch testified that Mr. Dorsey knew what was going on.”

This testimony was not in this disbarment proceeding. It was given by Hatch in certain Anti-Trust proceedings in the Federal District Court in Ohio. Dorsey was not a party to those proceedings. His testimony in that case is continued on page 128 of the record. Obviously he could not cross-examine Hatch in that case and obviously cannot be bound by that testimony. In this case, Hatch testified (R. 49) :

“Q. Did you get any help from Mr. Brown on it?

• • • • •

“Q. How about Mr. Dorsey?

“A. Yes, he put two words in it I think and very likely he may have given me some advice. I may have discussed it with him, but as to anything he did I think there were two words he put in.”

Such testimony cannot be in quantum or quality the basis for disbarment, particularly where Dorsey testified that he never discussed the Hatch article or the Clarke article with Hatch (R. 104), and gave fully his complete knowledge of and connection with the article and the entire case.

Discussion

This is a factual case and nothing else. It would unduly burden this Court to review and analyze the testimony contained in several printed volumes on file with its Clerk. Respondents have printed Dorsey's minuscule connection therewith (R, 94 et seq.). It contains nothing which would warrant his disbarment. No novel or important questions of law, indeed no questions of law of any nature, are involved. The District Court believed that, where an administrative agency had ruled, it was bound by the conclusion of the agency. This was error. The Court below gave the judicial review prescribed by statute.

Dorsey's disbarment by the Patent Office was unjustified. It was pronounced in a harsh denial of every protective presumption of the law in his favor. While a formal hearing was set up, its effectiveness as an instrumentality to assess responsibility for conduct wisely was nullified, as to him, by the erroneous interpretation of the language of this Court in the *Hazel Atlas* case *supra* and the goad which the Committee and the Commissioner construed that decision to be to find guilty anyone and everyone who was ever a Hartford agent, attorney or collaborator, regardless of his guilty knowledge and intent. Dorsey's innocence has been found after a painstaking and tedious analysis of a long and tiring record by the Court authorized by Congress to make that determination. To re-review that determination now would be needlessly a wearisome task. It would invite the re-tangling over again of a web of suspicion, in the hope this time to make the web tight enough to prevent escape through its close-drawn meshes of even the most irreproachable acts. It would imperil the security of many lawyers, situated as Dorsey was in this case. He was, as it has

been shown, for a time local, associate counsel. His principals were miles away from him. He had no knowledge of what they were doing. He had confidence and trust in them and in their conduct of a cause over which they were the general counsel. He had a right to put trust and confidence in them. He was justified in his reliance. Until something occurred to change his opinion, his position as local was subordinate to that of general counsel, who he believed would ethically and unimpeachably perform their duties as lawyers, to the best interest of their client to be sure but always honorably and within the demands of rectitude. As local counsel, his engagement did not indicate he should act with suspicion in the matters entrusted to him of the motives, methods, means or purposes of the general counsel who engaged his services. Any lawyer of experience who has been engaged as Dorsey was in this case appreciates fully and understands Dorsey's predicament in the unfortunate situation which developed. Washington as the capital of the Nation increasingly requires relationships between local and distant attorneys. The plain lessons experience has taught of the character which those relationships have developed ought not to be lost in a subjection of their existence to tests which lack understanding and vision and which ultimately will result in making their formation too dangerous longer to be practiced or adopted. We think that lurking behind the present Petition is irritation at the language used by the Court below. But this Court obviously cannot concern itself with matters of rhetoric or the quantum of judicial condemnation shown in a lower Court's opinion. This Court does not review a factual situation except in extraordinary circumstances. They do not exist here. *Crowell v. Benson*, 285 U. S. 22, 65.

Conclusion

The Petition should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM 1949.

—
No. 53.
—

LAWRENCE C. KINGSLAND, Commissioner of Patents,
Petitioner,

v.

VERNON M. DORSEY.

—
On Writ of Certiorari to the United States Court of Appeals
for the District of Columbia Circuit.

—
BRIEF OF RESPONDENT.
—

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**On Writ of Certiorari to the United States Court of Appeals
for the District of Columbia Circuit.**

BRIEF OF RESPONDENT.

The basic question for decision by this Court is whether Dorsey, a lawyer of over 50 years honorable practice, is to be disbarred for acts done 23 years ago on the strength of implications derived from the decision of this Court in a case in which he was not a party, for the order of disbarment, is not bottomed in fact on any evidence produced in a proceeding in which Dorsey was a party, but on the de-

cision of this Court in *Hazel Atlas v. Hartford-Empire Company*, 64 S. Ct. 997; 322 U. S. 238.

Note: It is alleged in the Brief for Petitioner that the record here is substantially the same as in the Court's cases. This is not so. The sworn testimony here, exclusive of exhibits, covers over 600 printed pages and includes the deposition of Hatch (130 pages), Carter (60 pages), Dorsey (30 pages), Brown (130 pages) and Clarke (250 pages). Dorsey only appears in the Court cases by a two page affidavit printed here as Exhibit D-72B (Tr. 889) made under the circumstances stated on pages 940-941 of the record and Clarke was not heard at all therein. The record before the Court did not include the Dorsey Exhibit 72C (R. p. 759) being a letter from Hatch to Dorsey dated the 20th of May 1926. Reference will be made to this letter later.

The first question on which a decision is asked by the Petition for Certiorari is—

“Whether the standards of ethical conduct for practice before the Patent Office approved by this Court in *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U. S. 238, were binding on the court below in reviewing an order of the Commissioner of Patents which barred respondent from practice before the Patent Office.”

It is submitted that this question is not here presented. The Court below in no way found a different standard from that declared by this Court. It held that on the record before it the facts as applied to Dorsey were not the facts found by the Court as applied to certain unnamed parties, and that the standard declared by this Court was not to be applied to what Dorsey had done.

In considering whether the lower Court willfully disregarded the expressed views of this Court, as is urged in the brief we must consider the facts found by the lower

Court. That such findings were correct will be shown in discussing the second ground urged for certiorari.

In the Hazel-Atlas case this Court on a record made up entirely of the pleadings and affidavits (322 U. S. at 240), found that (p. 241) certain officials and attorneys (*without giving names*) (1) determined to publish in a Trade Journal an article signed by an ostensible disinterested expert which would describe the "gob feeding" device claimed in the Peiler patent as a remarkable advance in the art; (2) prepared such article; (3) procured the signature of one Clarke thereto; (4) caused the article to be published in the National Glass Budget; (5) filed a copy of such publication in the Patent Office in the file of the Peiler application and (6) persuaded Clarke by the payment of a large sum of money to suppress the truth as to the origin of the article published over his name.

The Court thus found a conspiracy extending from the inception of the idea to the attempt to suppress facts.

The Lower Court whose decision is brought here for review found on the full record made in this case; that Dorsey and Brown, (the latter being the legal representative of the owners of the Peiler application) sometime late in 1925 discussed the desirability of filing in the Peiler case an affidavit by Henry Carter, an officer of a licensee of Hartford; that Carter declined to make such an affidavit as not being qualified; that Dorsey went to Europe in January 1926 and returning in April found on his desk a manuscript of an article prepared by Roswell F. Hatch; that Dorsey made some minor corrections (not exceeding two words) in the manuscript and returned it to Hatch; that there is no suggestion or evidence that up to this time Dorsey had any knowledge of the Hatch article or that Hatch intended it to be filed in the Patent Office and Dorsey testified that at the time of returning the article he had no intention of so doing; that Dorsey later remembered the Clarke article; that Hatch sent another manuscript in a letter to Dorsey dated May 20, 1926 (Exhibit D-72C, Tr. p. 759) stating that

he had shown Clarke a copy of what he had written and that Clarke had agreed "to rewrite the article to a considerable extent I suspect and publish it in the Trade Journal".

The U. S. Court of Appeals for the District of Columbia after finding as above exonerated Dorsey from any misconduct, but it is pressed by the petitioner that such exoneration disregarded the language of this Court in the Hartford case—

"Truth needs no disguise. The article even if true should have stood or fallen under the only title it could honestly have been given—that of a brief in behalf of Hartford, prepared by Hartford's agents, attorneys and collaborators (322 U. S. at 247)"

It is submitted that this is illogical. The Court applied the language last quoted to those who participated in the six acts before listed. Dorsey was not an actor in any of them as stated. He did not plan or aid in the planning of the Clarke article to influence the Patent Office; he was not acquainted with any improper pressure on Clarke to father the article; he did not know that the Clarke article was the same as that prepared by Hatch and he was not a party or in any way participated in the payment of any money to Clarke. His conduct must therefore be judged by a different standard than the conduct of those who were active participants. Dorsey was a proverbial "bystander" and perhaps the tool of others.

This Court used the language quoted as applicable to those guilty of the several conspiratorial acts found to have been planned and carried out. The Court of Appeals was weighing the guilt of Dorsey, the only one before it and who it had found was not a party to the general plan and who innocently participated in one of the acts only. Undoubtedly the Court below would have followed the intimation in the decision of this Court if it found that Dorsey had filed the Clarke article with full knowledge of its history whether he did or did not know the statements therein were

true. He did not know the history and the statements made were true, for Dorsey had obtained a thorough knowledge of glass practice beginning in 1898 as Patent Counsel for the Corning Glass Works, and had from 1912 been in the thick of the feeder fights (Tr. 147).

The second question on which a decision is asked by the Petition for Certiorari is—

“Whether there was sufficient evidence in the record before the Commissioner of Patents to support his order barring respondent, one of Hartford's attorneys, from practicing before the Patent Office on the ground that respondent had participated in perpetration of the fraudulent scheme specifically condemned by this Court in the *Hazel-Atlas* case.”

In 1926 there was pending in the Patent Office the application of one Peiler (the file wrapper of which is Ex. E) owned by the Hartford Empire Company (hereinafter called “Hartford”) of Hartford, Connecticut.

Robson D. Brown was a resident of Hartford, Connecticut and had charge of the Patent Department of the Hartford-Empire Company.

Roswell F. Hatch was employed in Hartford by the Hartford Company as a contact man between the engineers and the Patent Department.

Henry W. Carter of Toledo, Ohio, was an officer of the Owens Bottle Company, which was a licensee of the Hartford-Empire Company.

Dorsey was located in Washington and was the associate attorney in the Peiler application. In 1926 he was 57 years of age and had practiced before the Patent Office for thirty-six (36) years. No charge of misconduct had ever been made against him up to the date of the trial (R. 69). He had had much experience in glass matters. After 1928 Dorsey ceased any close connection with Hartford and was only called in when his experience might be of any value. (R. 163).

Neither Carter nor Hatch was an attorney in the Peiler application. While Brown was not an attorney on the record in the Peiler case, he, as the understudy of W. H. Honiss, the principal attorney, and by virtue of his position as head of the Patent Department of Hartford, was in control of the prosecution of the case.

The proceedings were initiated by a "Show Cause Order" against him dated October 11, 1944 why he should not be disbarred from practice before the Patent Office (R. 9). At the same time identical charges were preferred against Robson D. Brown, Henry W. Carter and Roswell F. Hatch (Tr. 2); the specific charge in each citation being that each respondent had for the purpose of obtaining the allowance of the Peiler application participated in the preparation of an article published in the Glass Worker, a trade publication, over the signature of William P. Clarke and filed such article in the Patent Office "knowing that such article was not by the said Clarke".

The Commissioner appointed a Committee consisting of seven of his subordinates to hear the evidence and to submit recommendations and appointed a prosecutor.

The cases for the four respondents were consolidated for taking testimony (R. 61). As a result the record contains much not germane in any way to Dorsey, and much not binding on Dorsey and therefore Dorsey reserved the right of objection until such time as he should be notified that the testimony bore on him. He was promised such notice (Tr. 37), but never received it until the decision of the Committee finding him guilty.

The Committee received in evidence over the protest of all respondents, extracts from the finding of the District Court for the Northern District of Ohio in the Anti-trust case in *United States v. Hartford-Empire Co.*, 46 F. Supp. 541; the decision of the Circuit Court of Appeals of the Third Circuit in *Hazel Atlas v. Hartford-Empire Co.*, (137 F. (2d) 64) and the decision of this Court in the appeal therefrom, although in none of these was Dorsey a party.

The counsel for the Commissioner urged on the Commissioner's Committee that the decisions placed a burden on respondents to show cause why they should not be disbarred (Tr. 16).

Note: "It had been judicially established that a fraud was committed. The decisions make out a *prima facie* case that respondents perpetrated the fraud". (Brief for the Department of Commerce, Page 4).

The Committee while not adopting in terms this contention did so in effect. In their decision, after many references and full quotations from the Court's decisions they found Dorsey and the others guilty not only of the charge in the specification, but of numerous other acts without pointing where in the record made before them there was found proof of such guilt.

Five of the Committee recommended to the Commissioner that disbarment orders be issued against Dorsey and two recommended a suspension for a limited period. All recommended the disbarment of the three other respondents.

Thus, they heard testimony and adjudicated guilt

(a) as to Dorsey's participation in the preparation of an article, knowing it to be used for filing in the Patent Office;

(b) as to Dorsey's filing the article in the Patent Office without notifying the Office as to its origin;

(c) alleged improper reasoning in a brief filed by Dorsey in the Patent Office;

(d) alleged improper reasoning in a brief filed before the Court of Appeals of the 3d Circuit after the Peiler patent had issued;

(e) payment of money to Clarke in 1932, six years after the article was filed in the Patent Office.

At no time during the taking of the testimony or prior to the report of the Committee was Dorsey informed in any way that any misrepresentation of the contents of the Clarke article, or the payment of money to Clarke would be considered in determining his guilt of what he was charged with.

The Committee treated all of these matters *in extenso* and apparently based their recommendation of disbarment on Dorsey's participation in each of them, although they did not take the trouble in their report to specify where they found in the record any proof of Dorsey's participation in some of them.

The brief for the petitioner here seeks to support each of these charges by constant references to testimony not germane to Dorsey or relevant against him and by incomplete quotations. Some of these we will specifically refer to later, but the great length of the petitioner's brief will prevent us from noting each of them.

The District Court intent perhaps on the overall picture as affecting Carter and Hatch also neglected to consider Dorsey's position separately and in detail. The only discussion as to the testimony against Dorsey in Judge Morris' decision is found on pages 22, 24, 26 and 30 of the Record.

Dorsey's participation in each of the five items named above will be discussed separately and in detail.

AS TO THE ALLEGED PARTICIPATION BY DORSEY IN THE PREPARATION OF AN ARTICLE WITH THE INTENT TO FILE IT IN THE PATENT OFFICE TO INFLUENCE THE ACTION OF THE OFFICE IN THE PEILER CASE.

(For Committee's discussion, see Record p. 42; for that of Judge Morris, see *idem*, p. 19.)

We have added the emphasized words in the above heading because it is quite obvious that Dorsey could properly, without odium of any kind, participate in the preparation of any technical article for general public consumption. With this preamble we will discuss the proofs as to Dorsey's participation in the preparation of the article.

The facts as to Dorsey's alleged participation in preparing or helping to prepare the article are fully and correctly stated in the opinion of the Court below.

The testimony supporting this is as follows:

Dorsey testified (R. 162).

"4. Deponent went abroad in January, 1926; that upon his return at the end of March or early in April he found on his desk a letter from Mr. Roswell F. Hatch, of Hartford, employed by the Hartford-Empire Company, stating that he (Hatch) had gathered data and had prepared an article, a draft of which he enclosed, and which Hatch stated he would submit to Mr. Maloney, who Hatch stated was president of the Bottle Blowers, with a view of getting Maloney to revise it, and after revision, to publish it.

"5. That Hatch in said letter requested deponent's criticism of the draft, but since the article so submitted by Hatch was not of the same nature as the article which had been desired from Mr. Carter, it had little interest to deponent, who, in the press of work awaiting his attention after two months abroad, only hurriedly read it over and returned it to Hatch, with two or three verbal corrections;"

Dorsey could not when testifying in this case produce the letter returning the manuscript to Hatch in April, but in the suit brought by the United States against the Hartford-Empire Company noted on page 26 of the petitioner's brief the Government took pretrial depositions in the Fall of 1946 and called for the production by Hartford of a letter

from Dorsey returning the manuscript. This was produced by Hartford and is shown on the opposite page.

Dorsey, who was called by the Government as a witness, recognized the letter and testified that the words "File 1000" found at the top thereof indicated that he had not written the letter in connection with the Peiler case, but in connection with the general business of Hartford. He also produced his ledger sheet for file 1000 H. E. Co.-General Matters" showing a charge of \$10.00 on the day the letter was written and testified that the file number of the Peiler Case was 1267 and that no charge is entered on that account for the day in question.

To controvert this testimony the petitioner relies on the testimony of Hatch in the Anti-Trust case (in which Dorsey was not a party) to the effect that he consulted Dorsey about the article, but on cross examination in this case he modifies this to the extent that he said he had some correspondence with Dorsey and "without doubt I did mention it to him verbally but I don't remember it particularly" (R. 125).

Again in an attempt to connect Dorsey with the preparation of the Clarke article a quotation is made from Exhibit C-70-7 a letter written by Carter to the President of his company. Carter testified that what was stated in that letter was based on his own ideas and not what Hatch told him (Tr. 618). Moreover, he testified that he never showed the letter to Dorsey and never talked with Dorsey about the article (R. 129). It is incompetent as proof of anything against Dorsey.

The petitioner recognizes this, attempts to show its relevancy by urging a conspiracy as to which there is no proof. This attempt is discussed by the Court below. (R. 82)

Certainly the established facts up to this time carry no proof or intimation of Dorsey's participation in a conspiracy to impose on the Patent Office. Appreciating this the petitioner in keeping with its policy to argue the case by suggestion and innuendo on page 36 suggests the conspir-

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IN ANSWERING PLEASE REFER TO
FILE NO. 1000

PATENTS AND PATENT CASES IN
THE FEDERAL COURTS, U. S. PATENT
OFFICE AND FOREIGN COUNTRIES

April 19, 1926

Mr. R. F. Hatch,
c/o Hartford-Empire Company,
P. O. Box 2121,
Hartford, Conn.

Dear Hatch:

I am returning herewith the essay you have prepared for Mr. Maloney. I have indicated one or two changes in language which I think might be advisable, and I beg you to pardon my temerity in putting them on your copy.

I wish you would send me a print of the production chart which is attached to the last page.

Yours truly,

VMD/EM

Enc.

W. F. Maloney

acy had its inception in the suggestion that the original plan was that Carter should make the affidavit, coupled with the assertion in the brief that the relations between Owens and Hartford were a deep and dark secret in 1926. There was no proof that the relations between Hartford and Owens were not generally known in 1926. They were known to the trade and the Patent Office. Carter's connection with Owens was also known and hence any article or affidavit by Carter, if true, could in no way impose on the Patent Office.

Again to prove Dorsey's intent to use the Hatch article in the Patent Office at the time he made the corrections and returned the manuscript to Hatch in April, the petitioner's brief refers to testimony not connected with this manuscript or time, but relating to subsequent dates.

Hatch at the time he sent the manuscript to Dorsey in April was as shown by the record in touch with Carter in making alterations and changes in his original drafts. See Exhibit C-70-3, 4 and 5 (R. 745, 754 and 756). There is nothing to connect Dorsey with this correspondence or to show Dorsey's knowledge of it.

As far as Dorsey is concerned his next connection with the article was when in preparing to amend the Peiler case in May, 1926 he remembered the graph attached to the Clarke article and wired Hatch for a copy. Dorsey testified: (R. 140).

Q. You wired for a copy of the draft? A. All right, because I had returned to Mr. Hatch the draft I had received in March. It went back to him. I didn't have anything. I was getting ready to amend the Peiler case, and I wanted to know what good I could gather out of the facts stated in that article.

Hatch on receipt of this wrote Dorsey the letter of May 20, 1926 (Exhibit D-72-C) (Tr. 759). We call attention to two points in this letter.

(1) Hatch sends Dorsey "one of the *original* drafts" which before it appears in print "will probably be changed considerably from the present form".

(2) Hatch tells Dorsey that Clarke said he would re-write the article to a considerable extent.

Dorsey does not remember seeing the copy that Hatch stated he was enclosing, but as Hatch stated he was sending it, presumes he, Dorsey, received it. (R. 666).

Nothing connects Dorsey further with the Clarke article in any way until after it was actually printed and a copy of it ordered for filing in the Patent Office with Dorsey's letter stating it to be by Clarke.

The attempt to establish that Dorsey from the beginning intended to use the article resulting from the Hatch manuscript is entirely unsupported. Stress is laid by petitioner on Dorsey's testimony that in April he found *facts* in the manuscript sent in which he wanted to submit to the Patent Office (R. 135). Certainly no blame can be attached to presenting facts, however obtained. Likewise there are many ways of presenting facts, such as by affidavit, which have never been criticized. Again it is quite evident that an attorney of Dorsey's standing would not decide to file an article or affidavit of any kind until he knew definitely and finally what was going into it. The manner of filing is, of course, another matter decision on which could wait until the last minute. Thus as stated by Dorsey he had reached no decision as to the use of or how to use the manuscript or anything growing out of it until it had crystallized. This took place on the publication of the article. (R. 122).

The petitioner calls attention to the dissent of Judge Edgerton. The only support the learned Judge finds for this is the affidavit of Dorsey executed in 1941, under circumstances explained by Dorsey on page 163 of the Record. This affidavit contains nothing contradictory to what is here urged. It is only not as full.

The Committee's Finding as to the Filing of the Clarke Article in the Patent Office with the Representation that Clarke Was the Author Thereof for the Purpose of Influencing the Action of the Office on the Peiler Application.

Dorsey admits that in signing the letter of October 11, 1926, which had been prepared by Brown (R. 119), calling the attention of the Examiner to the Clarke article as published (Ex. E, p. 263) he did it with the intent that if the Examiner believed the statements therein to be true (as Dorsey knew them to be) it would influence him in allowing certain claims to Peiler, but submits that in so doing he was not committing any act of malfeasance.

The Court of Appeals discusses the filing of the article on page 79 of the record and holds Dorsey not guilty of any bad faith therein and further holds that this particular charge is not covered by the specification.

Dorsey's testimony that he filed the printed article as by Clarke in ignorance of its identity with the Hatch manuscript he saw, read and returned on April 19, has been violently attacked as unsupported and improbable.

We answer that after nearly twenty years it is difficult to collect testimony, and that Dorsey's story is inherently probable.

(1) He read the many pages of the manuscript received in April in one hour. This certainly was not such close study as to impress the text on his mind.

(2) He may have well thrown aside the copy of the original draft sent him by Hatch in May without reading it. A busy man would certainly not waste his time on something which had been discarded as erroneous and which was to be rewritten or extensively revised.

(3) Dorsey never saw a copy of the manuscript Hatch showed to Clarke. Hatch's letter of May 20 (R. 259) establishes this.

It is utterly unreasonable to expect that Dorsey in July or August could recognize such similarity as may have existed between the manuscript read by him in an hour and the Clarke article.

As stated by Dorsey (R. 136)—

Q. Your testimony, as I understand it, to this Board is that when you filed the Clarke article in the Patent Office, you connected it in no way whatever with the Hatch article? A. Oh, it was connected. It was certainly connected. The Clarke article certainly had the basis of the manuscript that Hatch had sent me. There is no question about that in my mind. How close they were, I don't know.

Q. You made no effort to find out how closely— A. No, I didn't think it necessary. I couldn't see any reason for going in and finding out, and digging into a perfectly open thing, when the man had published it under his own name.

Q. Didn't you know that the article that was published in the name of William P. Clarke as author was, in fact, prepared by Hatch at the time you filed it in the Patent Office? A. I didn't know that the article that was published by William P. Clarke was identically the same or, in substance, as the manuscript I had received from Hatch. On the contrary, Exhibit C, this letter from Hatch gave me fair notice that the article might be materially changed. There was no reason for my going in and chasing it up. I wouldn't have minded putting it in under affidavit if I had gotten it the other way.

As before stated there is nothing in the record proving or suggesting that Dorsey, when he in April returned to Hatch the manuscript sent him by Hatch, knew that the article had been prepared for filing it in the Patent Office or that he contemplated such filing. Nor is there anything in the record proving that Dorsey recognized this Clarke article as printed as the same as the one written by Hatch or knew that Hatch used any improper influence in securing Clarke's acceptance of a Hatch manuscript as his own. Indeed if Dorsey had known of any close connection between Clarke and Hatch he would have set forth the facts stated in the

Clarke article in an affidavit, and filed in the Patent Office instead of the article, for as stated by Dorsey, such affidavit would have carried more probative value than the article itself. To assume that Dorsey, an experienced lawyer, would voluntarily open himself to criticism when a safe and more effective way was open to him is disregarding common sense. Dorsey knew no more than that Hatch had shown an historical manuscript to Clarke and that Clarke had agreed to take it, revise it or rewrite it in whole or in part. Perhaps knowing that Hatch had prepared a manuscript on feeder development and had shown it to Clarke, Dorsey was careless in not demanding proof that the article was composed in the whole by Clarke, but it must be noted that Dorsey had favorably known Brown, Hatch's associate in Hartford for many years and that Hatch had assured Dorsey in the letter of May 20, 1926 that Clarke would take the manuscript and would only publish it after having revised it to suit himself and perhaps rewrite it.

Under these circumstances it is difficult to see how Dorsey was guilty of gross misconduct in designating the Glass Works publication as by Clarke. As above pointed out there was no apparent advantage in filing it as by Clarke instead of incorporating it in an affidavit sworn to by Clarke.

As was held in the matter of Houghton, 67 Cal. 511 8P, 52

"Where it is not clear that the attorney intended to state a falsehood and so to deceive the Court, there is no ground for disbarment."

In addition to the above the Petitioner attempts to show that Dorsey represented to the Patent Office in filing the Clarke article that Clarke was adverse or hostile and does this by mutilated quotations. On pages 5 and 21 of the petition and on pages 5, 15, 36 and 38 of the brief, stress is laid on "reluctant witnesses" occurring in the brief filed by Dorsey before the Board of Appeals and by mutilated quotations it is made to appear that this term applied to Clarke. (On pages 5 the attempt is more pronounced in referring to

a reluctant witness). This mutilation is not inadvertence. We quote as follows from page 4 of respondent's reply brief before the Court below—

"On page 24 the Government's brief, by way of a mutilated quotation, attempts to damn Dorsey with a matter which was exploded at the hearing before the Patent Office. The omitted matter, which immediately follows the quoted matter, is 'Clarke in the exhibit in question gives a graph showing the rapid acceptance of suspended charge feeders which he terms 'gob feeders' and stresses the great displacement of manual workers occasioned thereby. Heintzelman, an experienced manufacturer of thirty-five years experience (see Appendix, pp. 69 and 73), states that there have been revolutions in glass feeding art in these years.' This matter was put up to respondent Brown who pointed out that the reluctant witnesses had reference to the presidents of the labor unions and did not include either Clarke or Heintzelman because Heintzelman, in his own affidavit, showed that he was an officer in the Hartford Company. Dorsey's testimony is that Brown's statement is correct (Rec. 672)."

It will be remembered that Clarke's article is based on the reports of the Union officers and it is these reports as given in the Clarke article that give weight to the article.

The Finding that Dorsey Mislead, or Attempted to Mislead the Patent Office as to the Import of or the Conclusion to be Drawn from the Clarke Article.

The Finding of the Committee that Dorsey Mislead or Attempted to Mislead the Third Circuit Court of Appeals as to the Conclusions to be Drawn from the Clarke Article.

As stated in the decision of the lower Court (R. 87) the Petitioner for Certiorari abandoned these at the hearing before that Court, for as there stated:

"The next two charges on which appellant was convicted are identical except as to the tribunal. One is that Dorsey misled or attempted to mislead the Patent Office as to the inferences and conclusions to be drawn from the Clarke article. The next is identical except that in that it is charged that Dorsey misled or attempted to mislead the Third Circuit Court of Appeals as to the import of the Clarke article.

"The latter was too much for the stomach of appellee's special counsel and he tacitly abandons it in his brief (appellee's brief p. 32). Yet appellant was tried and convicted upon this charge and so far as anything in the record shows this count may have been the moving consideration in administering the extreme penalty of disbarment. So far as we have been able to learn this count is a case of first instance in the judicial annals of this country. So far as we have been able to find never before in the history of the country has a subordinate committee of a mere bureau of the government had the arrogance to assume to set itself up as the protector of the dignity and intelligence of a United States Court of Appeals.

"It seems not untimely to remark that if counsel were to be disbarred if they made an inference or drew a conclusion as to the import of any evidence which happened to be at variance with the view of the same evidence held by opposing counsel or by the court, the bar of every tribunal in the country from the Supreme Court down to the Patent Office would soon be decimated.

"The trial court did not find that Dorsey was guilty of misrepresenting the contents of the Clarke article and in our opinion erred when it did not reverse the Commissioner for finding Dorsey guilty on this count.

The Petitioner has retracted his position before the lower Court and has urged that the Board was justified in disbarring Dorsey on this ground. We therefore present the following which was in our brief before the lower Court.

Dorsey did not mislead, nor attempt to mislead, the Patent Office as to the import of or the Conclusion to be drawn from the Clarke article.

The Committee's finding on this is found on pages 70 and 74 of the Joint Appendix and those of Judge Morris on page 33 of the Record.

The charge that Dorsey participated in the production of the Clarke article with the intent to use it in the Patent Office and the charge that he misled the Office as to the teachings of the article are, as a practical matter, inconsistent. Dorsey, a lawyer and an attorney of long standing, would not have prepared an article of which, before it became effective, he would have to distort the meaning. He would have so drafted it that it clearly and emphatically taught his thesis of patentability. The Committee found that Dorsey had misrepresented the import of the Clarke article. Judge Morris seems to have found no misrepresentation but attaches blame to the use of the article to influence the Patent Office even though the argument was made in good faith.

The Committee, however, made it the foundation of their conviction of Dorsey. In their report (Joint App. 83) observe the conclusion that "the matter before us, would have had a radically different aspect if when the Clarke article was filed in the Patent Office it had not been misrepresented as relating only to the commercial success of the specific invention described in the Peiler pending application", etc.

It is difficult to determine exactly how Judge Morris looked at this matter. He acknowledges that the affidavit of Peiler before the Board showed that numerous gob feeders had been in production beside those of Peiler and then sums up the basis of his finding of guilt as follows: (Joint App. 46)—

"It must be remembered, however, that Peiler claimed to be responsible for the invention of the features which made the other machines commercially

successful, and indeed stated that several competitors were paying royalties to the assignee of his patent. It does not follow that, because such an argument could be made in good faith, it was legitimate to support such argument by presenting an article in the preparation of which each of the three petitioners had, to some extent at least, participated, without disclosing such participation and that its publication had been procured by the assignee of the Peiler application."

Here guilt is predicated on

(a) Ascribing to Peiler the commercial merits due to his competitors devices.

(b) Making an argument in good faith based on an article, the content of which were true, but in the preparation of which respondent had participated.

The second ground is included in the charge that the filing of the article as Clarke's (or as the learned Judge indicates without informing the Office that Clarke had been requested to write the article by Hartford) was malfeasance. This has been discussed in the preceding section of the brief.

The Judge in ascribing, if he so does, wrong doing to giving credit to Peiler has misunderstood the situation and the law applicable thereto.

If this Court is willing to accept Judge Morris's finding that no misrepresentation of the teaching of the Clarke article was made, what follows under this heading may be disregarded. If not, we will ask it to continue its reading.

The Peiler application had in it claims broadly directed to shaping charges while hanging in suspension beneath an orifice of a furnace and after such shaping cutting them off to drop into the molds.

The claims stood rejected on a number of patents which did not show what Peiler was claiming but did show stream flow devices, etc., and the Examiner had urged that the idea of suspended charge shaping did not involve patentable invention thereover. The Clarke article showed that stream

feeders had been put out of use by the Owens suction feed which in turn was being superseded by suspended charge or gob feeders, naming as example of such feeders those of Hartford-Fairmont Company, George E. Howard, Tucker & Reeves, Wm. J. Miller, and others (Exhibit E, p. 304).

As above stated, the Committee found malfeasance in Dorsey's part in representing that the article referred to no successful gob feeders but those of Peiler. In holding this the Committee entirely overlooked and disregarded the Peiler affidavit (Ex. E, pp. 266 et seq.) filed with the Clarke article, which not only described and illustrated the specific embodiments of the several types of suspended charge feeders put out by his company but also of the types of feeders put out by Howard, by Miller, by Tucker & Reeves, all named in the Clarke article, with the amount of ware produced on each (Ex. E, pp. 275-278).

When it was called to Judge Morris's attention that the Committee in so holding had overlooked the Peiler affidavit showing that the named feeders were put out by competitors of Hartford and not by Hartford itself, Judge Morris supported the result reached by the Committee in the following language (R. 33):

"It is argued that the Patent Office could not have been lead to believe that the commercial success shown in the Clarke article related only to the Peiler invention because it was shown in the Peiler affidavit that numerous other gob feeders were in production. It must be remembered, however, that Peiler claimed to be responsible for the invention of the features which made the other machines commercially successful and indeed stated that several competitors were paying royalties to the assignee of the patent."

It is submitted that this view of the matter disregards established law and that the extensive sale by others than Peiler's assignee, and without the consent of such assignee, feeders embodying the claims in controversy is as much, or even more, proof of patentability of the claims (and this

was all the Board or the Court was called upon to pass on) than if the feeders in question had been put out by Peiler or his assignee. As was said in *Dillon Pulley Co. v. McEachran*, 69 Fed. (2d) 145, 146 (C. C. A. 8th)—

“A presumption of validity may arise equally from the commercial success of an infringer as from the commercial success of the patentee or his assigns.”

See also *Armat Moving Picture Co. v. American Mutoscope Co.*, 118 Fed. 840-849; *Murphy Wall Bed Co. v. Rip Van Winkle Wall Bed Co.*, 295 Fed. 748-754.

If such claims express patentable invention over the prior art they were patentable to Peiler because all questions of priority between him and the other workers at the same line had been settled by inferences decided in Peiler's favor.

As Dorsey testified (R. 143):

“Q. Did you regard the statements therein referring to gob feeding as referring to gob feeding by the apparatus and methods described in the Peiler application?”

“A. I regarded it, yes, in one way, in that it referred to our apparatus, but that we were claiming so broadly that all this gob feeding—all these gob feeding devices mentioned there would fall within the claims. I can't give you a direct yes or no answer to that, because I have to qualify it that way. I regarded it as a general discussion of gob feeding, and I also knew that our claims were so broad that they would probably overlap and cover all these gob feeders mentioned.

“Q. Did you mean to argue to the Patent Office that the Clarke article justified the argument that the Peiler invention of that application had revolutionized the art?”

“A. I intended to use it, and I did use it to show that gob feeding was a very great advance in the art. Now, who was entitled to the broad claims on gob feeding is not discussed in that article. That was what was before the Board.

“Q. Didn't you use that article as indicating the revolutionary advance that had been made by Peiler?”

"A. I think the revolutionary advance was made by gob feeding, yes, and we were the only applicant before the Patent Office with these claims, and I presume it necessarily followed that that innuendo was that it was made by Peiler. We had gone through a good many inferences leading up to that conclusion."

• • • • •
 "Q. Didn't you mean to argue thereby that Clarke there was testifying to the advance made by the Peiler invention?

"A. Clarke was testifying to the advantage of gob feeders and as our claims covered gob feeders, there was certainly an advance made by this invention. I think that was the line. There is nothing in the Clarke article that would indicate Peiler was the broad inventor.

"Q. No, but you argued that article to the Patent Office to establish primary inventorship of Peiler?

"A. No, but as to the advantages of gob feeding, and we based prior inventorship of Peiler on his own dates, and the fact there was no other contestant for that honor. I didn't argue he mentioned Peiler at all. He didn't."

It is submitted that there was no misrepresentation as to the teaching of the Clarke article and that any criticism as to the Clarke article must be based entirely on the fact that it was filed by Dorsey. When so considered, the argument based on it is not an additional offense of Dorsey but only is brought into this case as a bolstering-up device.

In any case Judge Morris was wrong in not reversing the Commissioner because the Committee found misrepresentation of the contents of the Clarke Article to be of the essence of Dorsey's malfeasance.

Dorsey did not mislead, nor attempt to mislead, the 3rd Circuit Court of Appeals as to the import to be drawn from the Clarke article.

The charge here is identical with the one last considered except for the *forum*. If Dorsey is excusable for his argu-

ment before the Patent Office on the Clarke article, he is likewise excusable for the same argument made before the Court of Appeals. He testifies that he knew no more in 1932 as to the origin of the Clarke article than he did in 1926 (R. 936). Indeed it is a fair inference that in the haste and work of preparing a brief of ninety-eight pages, in which the reference to the Clarke article amounting to one paragraph (for this see R. 383) was inserted by another, he entirely forgot what little he knew in 1926 about its origin. There was nothing added to his knowledge as to the history of the article in the interval. He testified (R. 142):

"I knew no more in 1932 as to the preparation of the Hatch article than I did in 1926. I didn't know as much because it was such a normal thing, filing it in the Office, that anything connected with it had passed out of my mind completely."

It is significant that the Court of Appeals of the 3d Circuit knowing as much or more about the history of the Clarke article as did Dorsey at the time, refused in the Shawkee case in 1934 to modify in any way the holdings in the prior Hazel-Atlas case. (Tr. 392-395 and 667, 668.)

The Findings of the Committee as to the Payment of Money to Clarke in 1932.

(For Committee's report see Record pages 54 et seq.; for Judge Morris's views see Record pp. 28 et seq.).

The Committee evidently placed great weight in reaching their conclusion as to guilt and as to proper punishment on this event. In their report (R. 54) we find the following:

"Nearly six years elapsed after the article was filed in the Patent Office before other events, relevant to the conduct of these *respondents* with respect to it, occurred. These subsequent events cast their light backwardly on the activities of the *parties* during the time of preparation and filing of the Clarke article, giving added illumination with regard to the purposes, understandings, and intentions of respondents at that time." (Italics supplied)

This means that the conduct of all respondents (thus including Dorsey) is to be judged by the payment. This is acknowledged in the answer of the Commissioner to Dorsey's petition to the District Court (R. 17):

"He (Commissioner) states that the petitioner was or should have been aware that the payment of money to Clarke for his part in the publication of the article might be considered in connection with the disbursement proceedings against the petitioner."

More than half of the record before the Board was devoted to it and yet in that half there is not a mention of Dorsey nor a scintilla of proof connecting him with it. This was specifically held by Judge Morris who in his opinion said (R. 30):

"There is nothing in the evidence that connects Dorsey with the payment of any money to Clarke."

This charge has such influence in this case that we quote in full the findings of the Court of Appeals thereon. (R. 82)

"We come now to the last charge, the charge involving the payment of \$8,000.00 to Clarke by Hartford some six years after the publication of the article. The committee and the Commissioner seem to have put great emphasis upon this transaction in arriving at the punishment of disbarment. But neither the committee nor the Commissioner nor any one else can find in the record one scintilla of evidence connecting Dorsey in any way directly or indirectly with the payment to Clarke or with having the slightest knowledge or intimation of it until it was brought out in open court in Toledo in 1941. While the committee's findings lay great stress upon this point in arriving at the maximum penalty, appellee in his brief attempts to limp away from it. He says (p. 321): 'There is no evidence in the record that Dorsey participated in the arrangement for those payments or even knew of them at the time they were made. Consequently, we have never made any point against Dorsey because of the payments *per se*.' Then appellee somewhat lamely tries to

side out of this admission by the somewhat boastful assertion that if it had been necessary he could have tied Dorsey into this transaction '*through the conspiracy rule.*' Appellee's eminent special counsel apparently overlooked the admitted fact that no conspiracy was alleged and that appellant and no one else was tried on that charge. The amount of attention paid to this finding by the committee and the Commissioner, with which Dorsey was not even remotely connected, indicate that the whole finding should be reversed outright."

The third question raised by the Petition for Certiorari is—

"Whether there was any denial of due process of law in the proceedings leading up to the Commissioner's order barring respondent from practice before the Patent Office."

It is submitted that the District Court of Appeals had jurisdiction for two reasons, first, absence of due process of law and second lack of substantial proof to convict Dorsey. These are separate sources and arise independently of each other for the statute authorizing disbarment by the Commissioner for "gross misconduct" subject to review by the Court does not give the latter jurisdiction in cases involving absence of due process, that existing independently and prior to the Statute.

The Congress has always recognized that the right of an attorney to practice before the Patent Office is of value and that he should not be arbitrarily deprived of that privilege without a review by a higher authority than the Commissioner of Patents.

The Extent of Review.

Section 8 of the Patent Act of 1861 (16 Statute at Large, Chapter 230) provided in part

"That the Commissioner * * * for gross misconduct may refuse to recognize any person as a patent

agent either generally or in a particular case but the reason of the Commissioner for such refusal shall be duly recorded and be subject to the approval of the President of the United States."

By Section 17 of the Patent Act of 1870 this was amended by substituting the approval of the Secretary of the Interior for the approval of the President and this was re-enacted in the Act of 1874.

The Court of Appeals, District of Columbia has held that, under the Act of 1874, the reviewing and approving power was solely in the Secretary of the Interior and that its jurisdiction was only to consider whether due process of law was observed in the Office and in the Department, specifically holding that the decisions reached in the Department were not subject to review by any other tribunal for any supposed errors (*Wedderburn v. Bliss*, 12 App. D. C. 485).

In *Garfield v. Spaulding*, 32 App. D. C. 153, the Court of Appeals, District of Columbia held that the Court had power to set aside a disbarment order when there was a denial of due process of law.

In *Wedderburn v. Bliss*, *supra*, the Secretary had affirmed the decision of the Commissioner issued after hearing before the Commissioner without he, himself, having heard argument on behalf of Wedderburn. Wedderburn applied for a mandamus to compel the Secretary to grant him a hearing before affirming the order of the Commissioner. In affirming the order of the District Court denying mandam, the Court of Appeals, District of Columbia said (p. 492):

"The question in this case is, whether appellant had in the Department of the Interior the hearing upon his case to which he was by law entitled. For, as to the character of the judgment to be rendered upon such hearing there is of course, no pretense that it can be controlled or directed in any manner by the

courts of law, or that it is subject to review by any other tribunal for any supposed error. In the final determination upon such hearing is for the Secretary of the Interior and not a matter for the consideration of the courts." (Italics supplied.)

The Statute of 1874 again came before the Court of Appeals, District of Columbia in *Robertson v. United States*, 285 Fed. 911. In that case the Court said (p. 914):

"The review and approval of the Secretary of Interior, designed as they are to correct errors or mistakes affecting the right of patent attorneys takes the place of the usual judicial safeguards provided for established courts and, completing as they do the whole proceeding, must be regarded as judicial acts."

This was the situation of legislation and adjudication when in 1922 Congress amended the provisions for approval by the Secretary and provided that the action of the Commissioner may be reviewed by the District Court. The legislative history of the act indicates the Bar Association supported review by the Court. (H. R. 174, 67th Congress, 1st Session, Serial No. 7920, Vol. 1.)

We therefore submit that the Congress in substituting review by the Court as it did in the Act of 1922 for the approval by the Secretary of the Interior as in the previous Act meant that "review" that the Court of Appeals was referring to in *Wedderburn v. Bliss*, supra, and which the lower Court has by virtue of the use of the same word "review" in Title 18, Sec. 26 of the D. C. Code of 1901, over the acts of the District Court and vested in the Courts of the District the same right of review and approval that had been previously vested in the Secretary of the Interior so that this Court has double jurisdiction; namely, that arising from being the guardian of due process of law and that of a general reviewing authority.

Under this contention no greater dignity or finality can be given to the order of the Commissioner here complained of than would be given to the order of a District Court dis-

barring an attorney. This Court in its appellate capacity has the right and duty to consider the sufficiency of evidence to support a charge of disbarment and to justify the punishment inflicted. (*In re Adriaans*, 28 App. D. C. 515; *in re Doe*, 95 Fed. (2d) 386, C. C. A. (2d).)

If this Court should determine that the action of the Commissioner of Patents was an administrative one rather than a judicial act contrary to the ruling of the lower Court in *Robertson v. United States*, *supra*, we invite the attention of the Court to Section 10, paragraph E of the Administrative Procedure Act of 1946. 5 U. S. C. A., § 1011. 14 L. W. 49. This Court and the Court below, under the provisions of the Act, have the right and duty to "judicially review the action of any agency and it *may review the whole record* of the proceedings had below for the purpose of ascertaining any prejudicial error." The burden of proof was upon the proponent of the rule. (Sect. 7C of the Administrative Procedure Act).

Section 10 E of the Administrative Procedure Act was thus discussed by Mr. Justice Holtzoff in the District Court of the United States for the District of Columbia in *U. S. v. Watkins*, 73 Fed. Supp., 216 on page 219 with a rather full discussion of the history of the Act and of the authority.

"2. The vital provision of the foregoing section, for the purposes of this proceeding, is found in Clause (5), which empowers the court to determine whether the findings of fact made by the administrative agency are supported by substantial evidence, and to set them aside if its conclusion is in the negative. The statute contains no exception to this provision. Consequently, in those cases in which the scope of judicial review had been restricted within narrower bounds, it was enlarged to that extent. In reviewing administrative findings, the court must always determine whether the findings are supported by substantial evidence. It is no longer sufficient, as has been true in some instances, that the findings be supported by some evidence. The result is that in a habeas corpus proceeding to review a deportation or exclusion order of the immigration au-

thorities, it is not enough that there be some evidence to sustain the findings of fact. They must be supported by substantial evidence. If the court reaches the conclusion that there is no substantial evidence to sustain the findings, they must be set aside."

In view of the foregoing, it is respectfully submitted that the District Court erred in holding:

"At the outset it is of first importance to make clear the function of this Court in the present proceedings. It is not that of the trier of the facts; it is to review what has been done in the disbarment proceedings and to determine whether or not the petitioners have had a fair hearing after due notice of the charge each was called upon to answer, and whether or not there is substantial evidence to support the action of the Commissioner of Patents." 69 Fed. Supp. 788, 792 (R. 18).

Substantial evidence to support the action of the Commissioner of Patents was not the guide for the Court below. *Substantial probative evidence on the whole record* was the criterion.

We invoke all of these fountains of jurisdiction of this Court in that we submit:

1. That there was not even substantial testimony adduced to connect Dorsey with any of the charges either that recited in the rule or the others considered in the report of the Board on which the order of disbarment was issued;

2. That the punishment inflicted for whatever transgression may have been committed bore no relation whatever to penalties generally imposed in disbarment proceedings;

3. Dorsey was not given due process of law in that he was tried and convicted of charges not included in the rule to show cause issued against him.

**Dorsey Was Not a Party to Any Conspiracy.
Before the Patent Office Committee.**

For convenience, we here repeat the charges Dorsey, by the Rule to Show Cause, was called upon to answer (R. 9):

"You participated in the preparation of said (Clarke) article and/or the presentation thereof to the United States Patent Office during the prosecution of said patent application knowing that said article was not written by the said William P. Clarke and with the purpose of deceiving the Patent Office as to the authorship of said article and influencing the action of the Patent Office on the said application."

The report of the Committee not only held Dorsey guilty as to the preparation of the Clarke article and the filing of it in the Patent Office in the manner charged but also guilty in misrepresenting to the Patent Office and to the Court of Appeals of the 3d Circuit the import of the said article and in connection with the payment of money to Clarke in 1932. We submit that the inclusion of these three additional matters in the findings against him is not only a violation of his rights but is indicative of the manner in which he was found guilty and the character of the report.

The provision for adequate notice is mandatory and a violation of it requires that the disbarment order be set aside. The Court in *Garfield v. United States*, 32 App. D. C. 153 said (pp. 158, 159):

"In this case the charge was limited to a particular act; namely, the purchase of warrants at an inadequate price; and was specifically denied. Due process of law in such cases requires specific charges, due notice of the same, an opportunity to make specific answers to them, an opportunity to cross-examine the witnesses in support of them, an opportunity to adduce testimony in contradiction of them, and an opportunity for argument upon the law and facts. *United States ex rel. Wedderburn v. Bliss*, 12 App. D. C. 485, 493.

"In considering other charges than those which the relators were called upon to answer, and founding his

order of disbarment thereon, the Secretary acted in excess of his jurisdiction in the premises. Even if the charge made warranted the broad interpretation, still, the relators had denied the specific one, and their answers contained no admission of guilt in any other respect. Consequently a finding against them must necessarily have been founded on testimony taken without notice to them, and without opportunity to cross-examine the witnesses, and to the consideration of which they did not assent in any way."

It is submitted that the misrepresentation of the teachings of the Clarke article, even if proven, cannot by any stretch of language be embraced within the charge of false assertion of authorship. Such alleged malpractice is independent of authorship and could exist if Clarke is held to be the author; for it is independent of who wrote the article and is and must be based solely on what the article in fact says and on what Dorsey argued therefrom.

Nor is it apparent on what ground the Patent Office is called upon to consider misrepresentation to the Court of Appeals of the teaching of the Clarke article. That occurred, if at all, in 1932, years after the Peiler patent had issued and passed out of the control of the Patent Office.

Also in 1932 occurred the payment of money to Clarke. This certainly is not covered by the charges and while there was much testimony as to it before the Committee, nowhere in the course of the hearing was it intimated to Dorsey that he should consider himself charged therewith.

This anxiety of the Committee to bring into this case "shoring up devices" is in keeping with the proceedings.

The Rule to Show Cause was predicated on the opinion in *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U. S. 238 and *U. S. v. Hartford-Empire Co.*, 46 F. Supp. 541, and the record in the *Toledo* case. None of the respondents before the Patent Office raised any question but that the citations were sufficient to bring them before the Committee and all answered. The opinions should have then dropped from the case. They were not proof against the

Respondent; for the Respondent was not a party to the cases in which the proceedings were rendered. Nor should they be given any greater weight than is justified by the record before the courts in discussing Dorsey's connection with the matters. The whole proof as to Dorsey in the *U. S. A. v. Hartford-Empire Anti-Trust* case and in *Hazel-Atlas Glass Co. v. Hartford* case is found on pp. 155-158 of the record.

However, the prosecutor was not content with the reference to the opinion as found in the citations. He read lengthy extracts from the Findings of Fact in the District Court in the *Toledo* case, and from the opinion in the *Shaw-kee* case in the 3d Circuit Court of Appeals (R. 25-30). The Committee, following the prosecutor's lead, devoted pages of their report to extracts from the cases referred to.

These holdings were urged on the Committee by their counsel (or by the counsel of the Commissioner, which is the same thing) as *proof of guilt*. He states his position clearly; namely, that they created a *burden* on the respondents to come and show why they should not be disbarred (R. 16). That they did influence the Committee is shown by the fact that the same counsel contended before Judge Morris for the *presumptive* correctness of the matters quoted from the decisions.

Burden of Proof.

It is quite in keeping that starting with the theory that the burden of proof of innocence was on Dorsey, the Committee was led to convict Dorsey. How many of us are able to affirmatively prove, after twenty years, the falsity of charges that might be made against us? Section 7e (5 U. S. C. A., 1005) of the Administrative Procedure Act provides that the proponent of a rule shall have the burden of proof.

Apparently the Committee was led by the remarks of its counsel (Tr. 674) to believe that great laxity in regard to questions of proof exist in disbarment cases and entirely

fail to apply the rule laid down by the Court of Appeals, District of Columbia. We quote as follows from *in re Adriaans*, 28 D.C. 515; 524:

"The power to disbar ought always to be exercised with great caution and only in clear cases. No criminal proceedings on this account were commenced against this respondent, and after this long delay we cannot agree with the court that the matters disclosed by this record suffice to sustain this order. *This is not a criminal proceeding, but such a charge should be supported by a preponderance of satisfactory evidence.* The case should be clear and free from doubt. The career of an unworthy member of the bar is apt to reveal misconduct more recent than in this case, where the proof is legally insufficient to disbar this respondent on account of an offense alleged to have been committed about twelve years ago." (Italics supplied)

To the same effect is Judge Killets' holding that "But we cannot find respondent guilty of misconduct here on a preponderance of evidence alone; it should be clear and convincing (*in re Thatcher*, 190 Fed. 969-1002).

On the question of the degree of quantum of proof necessary to justify disbarment or suspension of an attorney, this Court's attention is respectfully invited to the annotation in 105 ALR 984, et seq. Our own Court of Appeals in the *Adriaan's* case, *supra*, emphasized that the evidence must be supported by a preponderance of the evidence and that "the case should be clear and free from doubt." Some courts require a "clear preponderance". Others require the proof to satisfy the Court to a reasonable certainty; others clear and convincing; and some few that it must be beyond a reasonable doubt. All of these authorities are contained in the above quoted annotation and will not be analyzed again.

Statute of Limitations.

While the law generally is that the statute of limitations does not apply to proceedings for disbarment of an attor-

ney, nevertheless the great length of time ensuing between the date of the alleged occurrence in 1926 and the institution of proceedings to disbar before the Patent Office in 1944 requires this Court to examine carefully the proof presented. The right to practice a profession is a privilege, but before the privilege is granted long years of preparation are required as well as an investment in time, industry, labor and the acquisition of skill. This right should not be revoked on evidence necessarily unreliable, uncertain and incomplete because of its antiquity.

The Court's attention is respectfully invited to the language of the Court below:

"It is indeed tragic that the severe penalty of disbarment should be visited upon these petitioners for acts of such distance in the past. It is for this Court, however, only to say in this connection whether or not such delay constitutes a bar to the prosecution of the disbarment proceedings, or has so impaired the rights of petitioners to a fair defense that they cannot now be held accountable for their past conduct. I must answer both questions in the negative. The conduct of the petitioners called into question by the disbarment proceedings was not, nor does it appear that by reasonable diligence it could have been, known to officials of the Patent Office prior to the time that information and evidence as to such conduct became available during the trial of the case of United States against Hartford and other glass companies. After such information became known in that case and until the Hazel-Atlas and Shawkee cases were decided by the Supreme Court, the Commissioner of Patents had reasonable justification for not starting proceedings against these petitioners, whose conduct, although they were not parties to such litigation was under consideration in said cases. No showing has been made that the delay has prejudiced the petitioners in their defense." (69 F. Supp. 788-803, Joint App. 47).

It is believed that the Court should take judicial notice that after eighteen years, evidence is lost and memory fails.

Indeed this case illustrates this. The letter of April 17, 1946 from Dorsey to Hatch was missing when Dorsey testified in this case, to be brought to light by a demand of the Government on Hartford. Presumably it had been in the knowledge of the Government for years.

The annotator in L. R. A. 1915 D at page 1218 quotes as follows:

"Thus, in *People ex rel. Colorado Bar Asso. v. Tanquary*, 48 Colo., 122, 109 Pac., 260, the court dismissed a proceeding for disbarment of an attorney where the offenses complained of were shown to have occurred eight and one-half years before any investigation thereof was made or prosecution begun, the court saying that that fact alone was, in their judgment, sufficient answer to the charges, and that it had ever been the policy of the court to discourage proceedings of that sort upon stale claims, and properly so, as a matter of common justice to the one charged, who otherwise might manifestly be placed at great disadvantage.

"In *People ex rel. Noyes v. Allison*, 68 Ill. 151, the court, in dismissing an information for a rule upon respondent to show cause why his name should not be stricken from the roll of attorneys, said: 'Nearly seven years have elapsed since the alleged misconduct. No explanation is given for the delay and the law will not favor the institution of prosecutions of this character after the lapse of such a great length of time. The charge is a serious one, and if respondent should be found guilty, the consequences would be most disastrous. The party whose rights are injuriously affected by conduct of the character alleged ought to be required to exhibit his information within a reasonable time, that the attorney implicated might be afforded an opportunity to make his defense while testimony for that purpose could be had. In analogy to our statutes which bar prosecutions for misdemeanors, there ought to be a limit as to the time in which informations could be filed.'"

Likewise, in 45 A. L. R. 1111, we find:

"The Statute of Limitations has no application to delinquencies such as have been shown to exist. The

court, in such cases, will consider any unexplained, unreasonable delay in presenting the charges, and also whether, *by reason of such delay, the accused has been deprived of a fair opportunity of securing proof to meet the accusation*; but the proceeding for the disbarment of an attorney is not barred by the express terms of the Statute of Limitations, nor will the courts establish a limitation as to the time in which such proceedings may be instituted, by analogy to the Statute of Limitations, unless, from the nature of the circumstances of the particular case, it appears that it would be unjust or unfair to require the attorney to answer as to such occurrences." *People ex rel. Healy v. Hooper* (1905), 218 Ill. 313, 75 N. E. 896. (Italics supplied.)

"It is contended that the proceeding was barred by some statute of limitations, but the accused points out no particular limitations applicable to cases of this character. Staleness in a charge against an attorney might prevent its being considered, *because an unreasonable delay in the presentation of a charge of misconduct might make it impossible for an attorney to procure witnesses or the testimony which would have been available at an earlier time to meet such charge*; but the Statute of Limitations itself is no defense to such a proceeding." *Re Smith* (1906), 73 Kan. 743, 85 Pac. 584." (Italics supplied.)

It is submitted that two decades is too long a lapse between alleged occurrences and the institution of proceedings seeking to disbar.

Dorsey Was Not a Party to Any Conspiracy.

The petitioner apparently sensing that there is no proof of Dorsey's guilt *per se* seeks to load on him sins by a newly evolved theory of conspiracy not previously presented. In the absence of any other proof of conspiracy it sets up the Carter-Boshart letter as proving not only there was a conspiracy, but that it was therefore admissible as proof against Dorsey. We stress that the only contact proven to be had by Dorsey with the other alleged members of it was

a letter from Hatch in May and unproven conversations with Brown. Brown denies knowledge of any plan to use the Hatch-Clarke article in the Patent Office until after publication and knowledge of its contents. Dorsey had no contacts with Carter or Clarke.

The letter is not competent against Dorsey because—

(1) Carter has testified that the statements as to purpose contained therein were his own ideas and originated with him. It is not therefore even hearsay.

(2) Dorsey never saw the letter and had no contacts with its author about the Clarke article.

“ * * * The rules are that one defendant's connection with a conspiracy cannot be established by the acts or declarations of *other* defendants in his absence, and that a defendant cannot be bound by the acts or declarations of *other* defendants until (a) the conspiracy has been established and (b) the defendant's participation in the conspiracy has been established.” May v. U. S. U.S.C.A. 175 F. 2d 994 at 1007-8).

It is not necessary to conjure up a conspiracy to explain why Dorsey filed the Clarke article. He saw it as showing facts he wanted to bring to the attention of the Patent Office and not knowing its full history, filed it. When did the conspiracy originate and who was the contact man with Dorsey?

The Court Below Was Justified in Criticizing These Proceedings.

We have in the above refrained from referring to the findings of the lower Court that the proceedings in the Patent Office were grossly irregular and that the Patent Office has pursued Dorsey with improper vigor. For fear that this failure may be considered as approving the petitioner's contentions as to such findings we submit that:

(1) The Committee's proceedings clearly show that its members were intent on reaching a conclusion not only

following what this Court had found, but what stretch of construction they thought this Court meant irrespective of who suffered in livelihood or reputation.

(2) The proceedings for review indicate that the only substantial matter to be considered as to Dorsey is whether he filed the Clarke article with full knowledge of its history.

(3) The insistence of the petitioner, through its counsel in its attempt to fix guilt on Dorsey as to other and improper matters demonstrates the unseemingly vigor with which Dorsey has been prosecuted.

(4) The act of the petitioner in now bringing up the conspiracy theory shows that it has no substantial ground in the record to support the prosecution.

CONCLUSION.

We submit that all that the record shows approximating any misconduct on the part of Dorsey twenty-three years ago is that knowing that Hatch had persuaded Clarke to write an historical article framed to meet his, Clarke's, own views and to publish it over his name, he, Dorsey filed the published article in the Patent Office as the work of Clarke without calling on Hatch for a copy of any article submitted to Clarke by Hatch in order to make a comparison. We do not believe this was gross misconduct. At most it was negligence. The judgment below should be affirmed.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 53

LAWRENCE C. KINGSLAND, COMMISSIONER OF PATENTS,
Petitioner,

vs.

VERNON M. DORSEY,
Respondent

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

PETITION FOR REHEARING

The decision of this Court was announced November 21, 1949.

This Court affirmed the opinion of the District Court which had been reversed by the United States Court of Appeals for the District of Columbia.

This Court held that it was the Commissioner of Patents and not the courts that Congress made primarily responsible for determination of the issues presented. With deference,

respondent maintains that the statute is to the contrary. At the outset we wish to invite this Court's attention to the fact that the Patent Office was not functioning administratively in a patent matter. This was a disbarment proceeding.

The Statute (Title 35, Section 11, U. S. C.) empowers the Commissioner of Patents, after appropriate notice and hearing, to suspend a lawyer or exclude him from practice before the Patent Office because of gross misconduct.

Respondent invites the attention of the Court to that portion of the Statute which provides for judicial review of such proceedings. The opinion of the trial court, now affirmed by this Court, held that the review provided by statute was limited to whether there was substantial evidence to support the Commissioner of Patents ruling, as well as whether Dorsey had a fair hearing.

Review by the Court provided for in the pertinent statute is not the review of the action of an administrative tribunal in a matter where special knowledge or skill is reposed, such as a patent matter before the Patent Office, or a communications matter before the Federal Communications Commission, but the misconduct of a lawyer before the department which initiated, prosecuted and adjudged the proceedings. In the former case, review would depend upon the substantial evidence rule. In the latter, the purpose of judicial review is to insure independent and impartial review. That is the reason Congress changed the earlier statutes which provided for approval by the Secretary of the Interior to judicial review in the statute here pertinent.

Therefore, we submit that the District Court erred when it said: 69 F. S. 792

"At the outset it is of first importance to make clear the function of this Court in the present proceedings. It is not that of the trier of the facts; it is to review what has been done in the disbarment proceedings and

to determine whether or not the petitioners have had a fair hearing after due notice of the charge each was called upon to answer, and whether or not there is substantial evidence to support the action of the Commissioner of Patents."

Such a conclusion deprives the courts of the jurisdiction vested in them by Congress.

The Patent Act of 1861 (Section 8, 16 Stat. L. Chap. 230) provided that the Commissioner's action in such matters should be subject to approval by the President. The Patent Act of 1870 (R. S. 487) substituted approval by the Secretary of the Interior rather than the President. Judicial review, not administrative approval, became the law under the 1922 Act (Title 35, Sect. 11, U. S. C.).

In *Wedderburn v. Bliss*, 12 App. D. C. 486 (1898), which was decided prior to the provision for judicial review, the Court said:

"The provision that the judgment of the Commissioner shall 'be subject to the approval of the Secretary of the Interior,' does not make the Secretary a court for the trial of the case, nor does it make him in any proper sense an appellate tribunal before which it would be proper for a party in interest to demand and to be accorded a hearing. Such terms are nowhere in our legislation used for the creation of appellate judicial authority. They are most inapt terms for any such purpose, and they are equally inapt to constitute the Secretary the court of first instance, for which the findings of the Commissioner may serve as the findings of a referee or master in chancery. In the one case in our legislation in which similar or equivalent terms are used for the creation of supervisory quasi-judicial authority—the provision for the review of sentences of courts-martial by the President of the United States or by a commanding officer—it has never been heard of that such supervisory authority implies any right on the part of a person in interest to a hearing *de novo* before

such supervising power, notwithstanding that the exercise of the power is a quasi-judicial function.

"It is very clear to us that under this section 487 of the Revised Statutes, if it stood alone, the Commissioner of Patents, and not the Secretary of the Interior, constitutes the tribunal for the determination of cases of alleged malpractice occurring before his bureau, and that the hearing, to which an agent or attorney is entitled before exclusion from recognition, is to be had before the Commissioner. The authority of the Secretary is to review the record transmitted to him, and to give or refuse his assent to the Commissioner's recommendations, as he may think proper, and for any reason satisfactory to him. In other words, it is for the Commissioner to pass judgment; but that judgment is not to be given effect until it is approved by the Secretary."

But, it is noted that *approval only* was the statute when the above case was decided. Approval of court-martial proceedings by military authorities are final and, except for jurisdictional defects, cannot be reviewed by the civil courts. *Dynes v. Hoover*, 20 Howard 65, 15 L. Ed. 838, 844; *Mullen v. United States*, 212 U. S. 517, 520, 53 L. Ed. 632, 635. However, by the Act of 1922 (Title 35, Section 11), Congress substituted review by the Courts rather than approval by the Secretary of the Interior.

The legislative history of the 1922 Act (Volume 1, Serial No. 7920, H.R. 174, 67th Congress, 1st Session) indicates that the bar recommended review by the Court rather than approval by the Secretary. The change from administrative review by the Secretary to judicial review by the Court clearly indicates that it was the policy of Congress for a review of a more thorough nature than that provided for under the old law where the head of a department was approving the action of his subordinate.

Congress intended, in the amended statute, that the review of an order disbarring a patent attorney should be a

judicial review, rather than a mere "approval" by the head of an agency within the executive branch of the federal trilogy. In short, the review of an order of disbarment was declared by Congress to be a "judicial" rather than an "administrative" function. Nevertheless, this Court has upheld the decision of the District Court which failed to recognize that the review of an order of disbarment marks the initiation of the judicial process. That Court too narrowly circumscribed the orbit of review. The intent of Congress has been thwarted with the result that Dorsey has been denied the judicial review contemplated by the Congress.

The essential requisites of the scope of judicial review in disbarment proceedings was before the Court in the case of *In re Shattuck* (S. C. Cal., 1929) 208 Cal. 6, 279 Pacific 998. The statute which provided for review of the action of the Board of Bar Governors in disbarment proceedings provided: (Cal. Statutes 1927, p. 38.)

"Any person so disbarred or suspended may, within 60 days after the ruling, petition the Supreme Court to review said decision."

The Supreme Court of California held that such "review" meant a re-examination of the entire record as distinguished from the limited meaning of a writ of review or certiorari.

Again, in the case of *In re Scott*, decided by the Supreme Court of Nevada in 1930 (292 Pacific 291, 292), while interpreting a similar statute, the Court said:

"What is meant by the term review in this and other sections of the Act? —

"We are in accord with the authorities holding that the Supreme Court, on review of a decision of disbarment or suspension of an attorney by the Board of Governors of the State Bar, is not bound by the findings or recommendations made by a local Administrative

Committee, nor their adoption by the Board of Governors, and shall examine the entire record anew to ascertain whether or not any charge has been proven which merits disbarment or suspension."

In re Shattuck, 279 Pacific 998;

McVicar v. State Board of Law Examiners (D. C.)
6 F.(2) 33.

Likewise, in *In re McCue* (Supreme Court, Mont. 1927) 80 Mont. 537, 261 Pacific 341, the Montana Supreme Court held that statutory actions to review disbarment proceedings were intended to be judicial examinations similar to the review of the action of a lower court by a higher tribunal.

Because of the review by the courts as provided by statute and because the trial court felt that its jurisdiction was limited to whether there was substantial evidence to support the conclusion of the Commissioner of Patents, the respondent respectfully submits that this Court erred in determining this cause on the "substantial evidence" or the "substantial probative evidence" rule applicable to administrative bodies.

The trial court should have determined whether the facts presented to the Commissioner warranted disbarment. The Court of Appeals was correct when it said: 172 F. (2) 408.

"The majority of this court are of the opinion that the learned trial court takes altogether too narrow a view of its own jurisdiction. It proceeds upon the theory that the case is one for the strict and extreme application of the doctrine of 'administrative finality'."

The cause should be returned to the trial Court for appropriate determination as required by statute.

This Court, in its opinion herein, said: 18 L.W. 4032-4033.

"We agree with the following statement made by the Patent Office Committee on Enrollment and Disbar-

ment that considered this case: 'By reason of the nature of an application for patent, the relationship of attorneys to the Patent Office requires the highest degree of candor and good faith. In its relation to applicants, the Office . . . must rely upon their integrity and deal with them in a spirit of trust and confidence. . . .'

It was the Commissioner, not the courts, that Congress made primarily responsible for protecting the public from the evil consequences that might result if practitioners should betray their high trust. Having serious doubts as to whether the Court of Appeals acted properly here in nullifying the Commissioner's order, we granted certiorari.

"After an examination of the record we are satisfied that the findings were amply supported whether the measure be 'substantial evidence' or 'substantial probative evidence.' "

The vice of this conclusion, we respectfully submit, is that the Court is not passing upon a ruling by an administrative agency in a matter in which that agency has peculiar skill or knowledge. (*Swayne and Hoyt v. U. S.*, 300 U. S. 297, 303; 81 L. Ed. 659; *Rochester v. U. S.*, 307 U. S. 125, 145, 146; 83 L. Ed. 1147). Here the Patent Office was not determining the validity of a patent in which field presumably it was skilled, but adjudged Dorsey guilty of professional misconduct. The statute gives Dorsey a "review" in such a matter which, so far, has been denied him on the theory of administrative finality.

Courts license qualified attorneys to practice. Courts disbar attorneys for misconduct. The right to practice before an administrative agency is a valuable property right, no less valuable than the right to practice before a court. The withdrawal of such right in this case, as in many others, is the extreme penalty that may be visited upon a practitioner. Congress was aware of this. In order to safeguard the rights of those who practice before the Patent

Office, as well as to protect the public interest, it conditioned the withdrawal of this right on a full and fair hearing before the Patent Office, and a full and complete judicial review by the District Court. The logic and propriety of this statutory scheme is apparent. When an administrative agency orders disbarment, it is not performing a function, or acting in a capacity in which it is presumed to have either expert knowledge or the peculiar fitness upon which the so-called doctrine of "administrative finality" has been based. Rather, in such case the administrative agency is embarked upon the performance of a function which requires knowledge and judgment far afield from the speciality in which it is skilled.

For example, the Federal Communications Commission, Interstate Commerce Commission, Federal Trade Commission and Securities and Exchange Commission, and many others are tribunals vested by Congress with the right to determine certain issues. In such matters those bodies are presumed to have intimate knowledge in their particular field. It is only in those matters that an administrative order of the appropriate tribunal will not be set aside by the Courts when substantial evidence supports the findings cf. *Halloway v. R.R.B.*, 44 F. S. 59, 62.

Let it not be said that Dorsey was not disbarred. He was disbarred from the only practice in which he was skilled and in the vineyard where he has labored long and honorably (over 50 years).

If this was an administrative proceeding, the "substantial evidence rule" would apply or, if one wishes, "the substantial probative evidence" rule. Both mean the same. All evidence is for purposes of proof. The phrase "substantial probative proof" was born during the debates on the Administrative Procedure Act in the legislative halls

of Congress. There occurred a discussion between Senators Ferguson and McCarran as to the distinction between the "scintilla of evidence" rule and the stronger proof required under the review provided by the then proposed Administrative Procedure Act. In the legislative history of the Act, we find the following:

"Mr. Ferguson. 'Would the Senator then, say that the judgment or decision of the agency must be based upon stronger proof than a scintilla of evidence?'"

"Mr. McCarran. 'Very much stronger.'"

"Mr. Ferguson. 'The old rule which applied in the courts, particularly on certiorari, was that if there was any evidence to sustain the verdict or judgment, it should be sustained. The courts have many times so held. The Senator would say, would he not, that something more than "any evidence" is required to sustain such a decision.'"

"Mr. McCarran. 'The answer is in the affirmative. We say that the evidence must be substantial probative evidence.'"

"Mr. Ferguson. 'So we are changing the rule which has been applied in the past that any evidence, or a scintilla of evidence, as it is sometimes defined, is sufficient to sustain a verdict or judgment.'"

"Mr. McCarran. 'We tried as best we could to establish a guide for administrative groups so that they would apply the rule in such a way that there be substantial probative evidence behind their findings, and so that they could say, "We are not afraid to have our findings reviewed by a court," * * *'"

"Mr. George. 'The courts have many times held that if there is any evidence to sustain the finding of an administrative board under the statute, the courts have no power to intervene. If this bill should become a law would that rule, as heretofore construed by the courts, remain in effect?'"

"Mr. McCarran. 'The courts have given various constructions. The courts, in reviewing an order, are

governed by the provisions of section 10(e), which states the substantial-evidence rule. In other words, in some instances the courts have held that there must be substantial evidence. We are saying that there must be probative evidence of a substantial nature, and that even though the commission or bureau may take hearsay evidence in its hearings, it must have some probative evidence to sustain its finding.'

"Mr. George. 'The point I wish to raise is that some of the acts of Congress, particularly those enacted in recent years, have led the courts to hold—and they so hold—that if there be any evidence to sustain the finding of a board or agency, the court has no power to interfere with it.'

"Mr. McCarran. 'I would put it in this way——'

"Mr. George. 'Would the enactment of this bill require some substantial or probative evidence to support such a finding?'

"Mr. McCarran. 'Yes.'

"Mr. George. 'Take the labor relations cases. Senators are familiar with them. The Circuit Courts have frequently complained against what the Labor Relations Board did, but have said, "We are powerless to interfere with it" Would this bill change that rule, if the court were of the opinion that there was no probative evidence?'

"Mr. McCarran. 'Yes; it would change that rule.'

"Mr. George. 'I am pleased to hear it.' "

In view of the foregoing, it is respectfully submitted that the trial Court erred in holding:

"At the outset it is of first importance to make clear the function of this Court in the present proceedings. It is not that of the trier of the facts; it is to review what has been done in the disbarment proceedings and to determine whether or not the petitioners have had a fair hearing after due notice of the charge each was called upon to answer, and whether or not there is substantial evidence to support the action of the Commissioner of Patents." 69 Fed. Supp. 788, 792.

Substantial evidence to support the action of the Commissioner of Patents was not the guide for the trial Court. Dorsey was entitled to but was not afforded the judicial review provided by Statute.

The order of disbarment is fatally defective and the judgment sustaining it is likewise fatally defective, for the further reason that Dorsey and the others involved with him in this proceeding, were treated as co-conspirators in that the evidence adduced as to one was considered in determining the guilt of the others, including Dorsey. This pattern of proof was specifically held to be reversible error in *General Foods Corp., et al., v. Brannan, et al.*, 170 F. (2) 220, 224-5 (C. C. A. 7th, 1948). In this case, Major, Circuit Judge, speaking for a unanimous court which included the then Circuit Judge (now Associate Justice) Minton and Briggles, District Judge, held (at page 224, col. 2, and at page 225, col. 1):

"But no court, so far as we are aware, and we do not propose to be the first, has held in *an administrative proceeding* or any other kind that one person can be held responsible for the actions and statement of another in the absence of a conspiracy or agreement." (Emphasis added.)

If the writ herein was providently granted, this Court should either affirm the Court of Appeals or remand the case to the trial Court for decision on the merits.

Respectfully submitted,

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I hereby certify that the foregoing petition is filed in good faith and not for purposes of delay.

JAMES F. REILLY.

(5525)